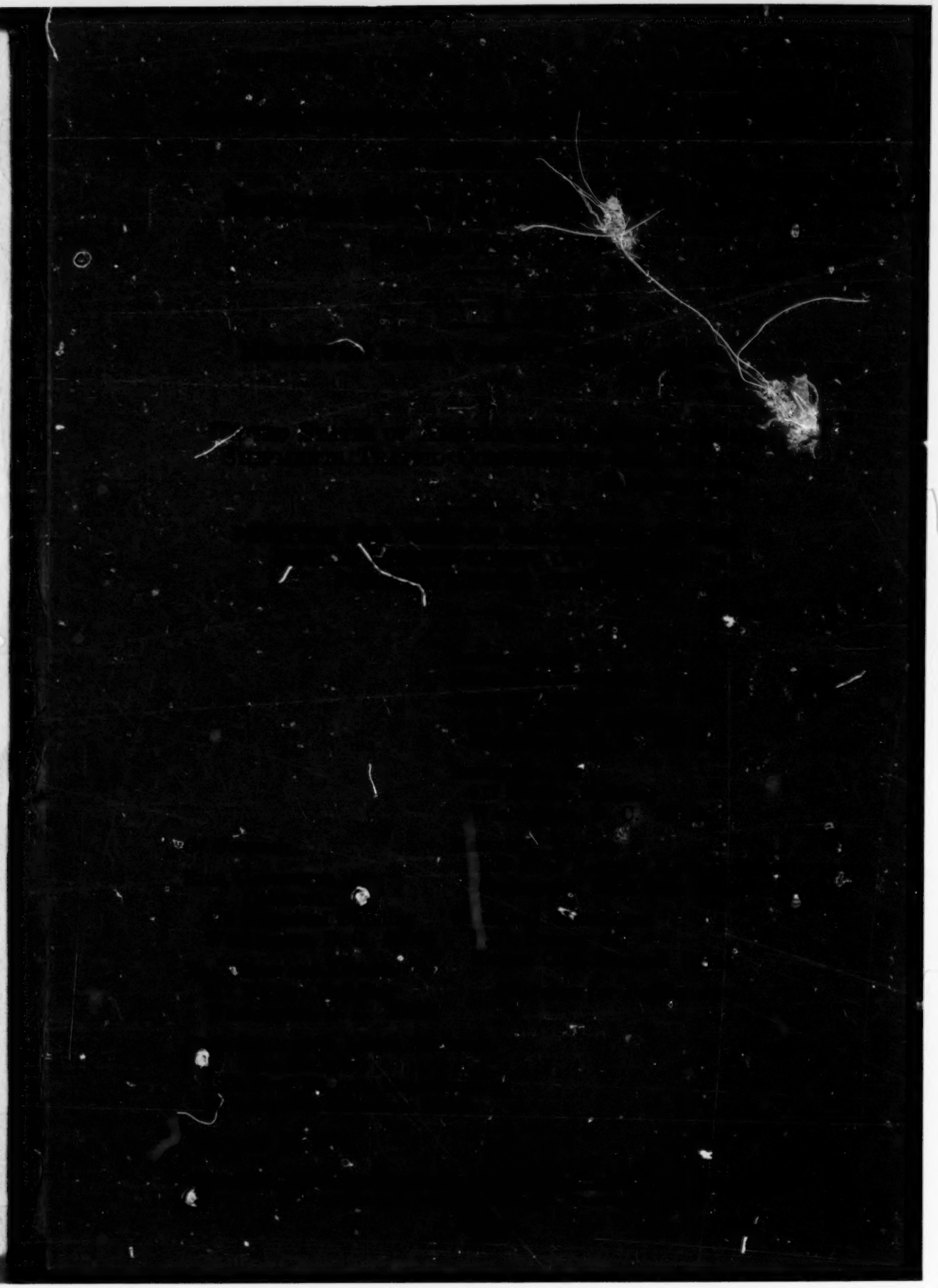

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA and NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 6, 1970.

OPINIONS BELOW

The opinion of the court below of which review is sought was entered October 6, 1970, in No. 19,863, *Middlewest Motor Freight Bureau* v. *United States of America,* and No. 19,870, *Middlewest Motor Freight*

Bureau v. *National Small Shipments Traffic Conference,* is printed at 433 F. 2d 212, and appears in Appendix A hereto. Earlier opinions by the District Court and respondent Interstate Commerce Commission [Commission] are as follows: judgments, findings of facts, and conclusions of law of the United States District Court for the District of Minnesota, Fourth Division, April 9, 1969, and September 5, 1968, in 4-65 Civ 285, *Middlewest Motor Freight Bureau* v. *United States of America* (Appendix B); Decision and Order of the Commission of February 24, 1965, in Docket No. M-17450, *LTL Class Rates & Minimum Charges Between Middlewest and Central Territories,* 325 I.C.C. 106 (1965) (Appendix C).

JURISDICTION

The jurisdiction of this court is invoked under Section 1254(1) of Title 28 of the United States Code. The judgment of the Court of Appeals was entered on October 6, 1970. A petition for rehearing was filed and was denied by order entered on November 16, 1970.

QUESTIONS PRESENTED

1. Where there has been a denial of an interlocutory injunction and the dissolution of a temporary restraint of an order of the Interstate Commerce Commission directing motor common carriers to cancel increased rates, does a court have power to grant counterclaims for restitution when there has been no adjudication of the merits of the carriers' claim that the Commission's order is invalid?

2. Does a court have power to order restitution for damages caused by the restraint of an order of the Interstate Commerce Commission directing motor com-

mon carriers to cancel increased rates without a determination by the Commission that they were unjust and unreasonable or that they exceeded maximum reasonable rates during the period of the restraint?

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and the Interstate Commerce Act involved in this case are set forth in Appendix D hereto.

STATEMENT OF THE CASE

Petitioners are the Middlewest Motor Freight Bureau, Inc. (Middlewest) and motor common carriers for which Middlewest acts as agent for the purpose of publishing tariffs setting forth the rates and charges of the carriers for the performance of transportation. Because of a need for increased revenues to meet increased costs of operations the carriers in 1963 directed Middlewest to publish for their account less-than-truckload rates increased by five percent and minimum charges [1] increased by 50 cents each.

The tariffs were initially suspended by the Commission, but subsequently, upon a finding by it that the carriers were in immediate need of additional revenue, the suspension was vacated and the tariffs allowed to become effective on September 7, 1963. However, the Commission continued its investigation. During the course thereof and again in response to a need for still more revenue, the carriers published and the Commission permitted to become effective on May 14, 1964, a greater increase in the minimum charges. The mini-

[1] Minimum charges are fixed amounts for the transportation of a shipment, no matter how small.

mum charges as thus further increased were never made subject to the investigation which proceeded to a conclusion and culminated in the issuance of an order by the Commission on February 24, 1965, finding the rates "not shown to be just and reasonable" and directing their cancellation. Nothing was said therein about what rates and charges were to be published in the schedules supplanting the schedules to be canceled and, as noted, some of them had already been supplanted by schedules naming even higher minimum charges than those ordered canceled. Because that order lies at the heart of the error committed by the Court of Appeals, the full text thereof is set forth below: (App. C p. 96a)

> "*It is ordered*, That the respondents herein be, and they are hereby, notified and required to cancel on or before April 14, 1965, the schedules described in the order entered on June 26, 1963, by the Commission's Board of Suspension upon not less than one day's notice to the Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.
>
> "By the Commission."

The Commission's decision of February 24, 1965, and the cancellation order issued by it on that date provided no guidance to the carriers as to rates and charges for prospective application. This was vital because during the months intervening between the hearing in the investigation case and the issuance of the Commission's decision therein the carriers had incurred substantially increased operating costs by reason of the labor contract with the Teamsters Union.

Through appropriate petitions they promptly sought reconsideration and rehearing of the Commission's decision and, upon denial of those petitions, they sought relief by two concurrent methods. First, on September 5, 1965, they filed on statutory 30 days' notice new schedules of rates and charges canceling those then in effect and naming even higher rates and charges than those which had been under investigation. Second, they brought suit in the United States District Court for the District of Minnesota (Fourth Division) under Sections 1336, 1398, 2284, and 2321-2325 of Title 28 of the United States Code to vacate, set aside, and annul the cancellation order of the Interstate Commerce Commission. They also sought and, on September 9, 1965, were granted a temporary restraining order as preliminary to an injunction *pendente lite* to restrain the Commission's cancellation order from taking effect on September 13, 1965. Meanwhile, they had postponed to November 16, 1965, the effective date of the new schedules naming the higher rates and charges so that the Commission might satisfy itself as to the urgent need on their part for not only retention of the rates and charges ordered cancelled but also for an increase in them to enable the carriers to meet their continually increasing operating expenses.

Thereafter, certain associations of shippers, having intervened as defendants, filed counterclaims seeking an award of damages *if the Commission's decision was affirmed.* Upon argument on September 24, 1965, the three-judge court declined to enter a preliminary injunction and dissolved the temporary restraining order, effective September 29, 1965. The carriers were then faced with the necessity of complying with the Commission's cancellation order.

On September 30, 1965, the carriers secured from the Interstate Commerce Commission a postponement of the effective date of the cancellation order to October 11, 1965, to allow them the time necessary to accomplish the compilation, printing, filing and distribution of new tariffs. In making this grant of extra time for cancellation, together with a grant of special permission to make the new tariffs effective on less than the 30-days' notice required by the statute (Section 217(c), 49 U.S.C. § 317(c)), the Commission directed, for the first time, that the carriers re-establish the level of rates which was in effect prior to the effectiveness of the rates and charges at issue in the case. No reason was given by the Commission for this requirement. Moreover, the order made no specific mention of the schedules naming the minimum charges under investigation which, as noted, had already been supplanted by schedules effective May 14, 1964, naming higher minimum charges which were not subject to the investigation. The Commission order of September 30, 1965, as described, is reproduced as Appendix E hereto.

The reduced rates thus required by the Commission took effect on October 11, 1965, but remained in effect only until November 16, 1965, upon which date the Commission permitted to take effect the new schedules of rates and charges which were even higher than those required to be canceled. Presumably the Commission was satisfied with the carriers' demonstration of revenue need because no event occurred between the date of filing those new schedules (September 5, 1965) and their effective date (November 16, 1965) which would otherwise explain the Commission's action.

With the cancellation of the subject matter of the Commission's investigation and the effectuation of

rates and charges producing revenues in excess of those which had been ordered canceled, the carriers perceived that their action to set aside the Commission's order had become moot. They thereupon filed an appropriate motion for dismissal of their complaint without prejudice and also for dismissal of the counterclaim of the associations of shippers. Prior to the hearing on this motion the United States was allowed to intervene as a shipper and to file a counterclaim for damages allegedly incurred during the period of the temporary restraining order.

The statutory three-judge court heard argument on both the merits of the carriers' complaint against the Commission decision and on their motion to dismiss both the complaint and the counterclaims. By its decisions of September 5, 1968, and April 9, 1969, Appendix B hereto, the court, without decision upon the merits of the carriers' complaint, granted the motion to dismiss in its entirety. Both the United States and the intervening associations of shippers noticed appeals to the Supreme Court from the judgments of the statutory three-judge court. Subsequently, the appeal of the United States, on its own motion, was dismissed. The intervening associations of shippers pressed their appeal which was dismissed for lack of jurisdiction. *National Small Shipments Traffic Conference, et al.* v. *Middlewest Motor Freight Bureau, et al.*, 396 U.S. 211 (1969).

Thereafter both the United States as a shipper and the intervening associations of shippers perfected their appeals of the dismissal of their counterclaims to the Court of Appeals. The Interstate Commerce Commission took no appeal. The case was briefed and argued to Judges Vogel, Gibson, and Bright, and

on October 6, 1970, the Court issued its opinion by Judge Gibson holding that the shippers were entitled to restitution in the amount of the difference between the level of rates at issue in the proceeding before the Commission, and the level of rates which was in effect prior to the publication of the rates involved in the Commission proceeding. (App. A) A petition for rehearing before the Court of Appeals was submitted and was denied by order entered November 16, 1970. The judgment of which review is here sought would reverse the judgment of the statutory court dismissing both the complaint and the counterclaims and would remand the case for disposition in accordance with the opinion of the Court of Appeals.

REASONS WHY THE WRIT SHOULD BE GRANTED

THE IMPORTANCE OF THE QUESTIONS

There are indeed what Rule 19 (1) of this Court describes as "special and important reasons" for the grant of this petition. This is a case of first impression. So far as we are able to ascertain, no federal court has ever before held that courts have power, independently of action by the Interstate Commerce Commission, to require common carriers to make restitution of freight charges collected under applicable and effective tariffs duly filed with the Interstate Commerce Commission.[2] The Court of Appeals itself rec-

[2] In the only other case dealing with the question we have been able to find the District Court for the Northern District of Georgia dismissed on its merits a suit by motor carriers to enjoin an order of the Interstate Commerce Commission directing the cancellation of increased charges. At the same time the Court denied restitution of the increased charges collected during the period of the temporary restraint of the Commission's order. *Central and Southern Motor Freight Tariff Assn.* v. *U.S. and I.C.C.*, N.D. Ga. Civ. No. 12,484 (1969).

ognized that the resolution of the issues before it does far more than adjudicate the rights and duties of the parties here *vis a vis* each other on the particular facts of this case. This is so because the resolution of those issues turns, not only upon the particular facts of this case, but also upon the interpretation and application of general principles of law governing the relations between all shippers and motor carriers.

Moreover, the resolution of the question whether the power the Court of Appeals exercised exists, and if so, the conditions under which it may be exercised, significantly bears upon the interplay and division of authority between courts and the Interstate Commerce Commission under the statutory scheme for the regulation of the rates of motor carriers prescribed by the Congress, as well as upon the ability of motor carriers to exercise effectively their statutory right to the judicial review of orders of the Commission.

The two questions presented are federal questions decided by the Court of Appeals, "in a way in conflict with applicable decisions of this Court." (Rule 19 (1)(b)) Furthermore, in thus deciding those questions the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Question 1

Where there has been a denial of an interlocutory injunction and the dissolution of a temporary restraint of an order of the Interstate Commerce Commission directing motor common carriers to cancel increased rates, does a court have power to require the carriers to make restitution when there has been

no adjudication of the merits of the carriers' claim that the Commission's order is invalid?

To ask this question is to answer it in the negative. It is fundamental that there is no right to restitution based upon the issuance of a restraint *pendente lite* at the instance of a plaintiff unless the restraint was improvidently issued. And whether a restraint was improvidently issued turns upon whether or not the action or conduct restrained does in fact violate the plaintiff's legal rights. To state this fundamental rule in terms of the case here, there is no right to restitution from the motor carriers based upon the temporary restraint of an order of the Interstate Commerce Commission directing them to cancel increased rates unless there is first a determination that the Commission's order was in fact valid. Nevertheless, the Court of Appeals held that "the shippers' right to restitution did not require a determination on the merits of the [Commission's] order." (App. A, p. 59a). This holding is contrary to all applicable decisions of this Court, and the remand to the District Court without directions to make a determination of the merits of the Commission's order is a departure from the accepted and usual course of judicial proceedings. Indeed, the holding and remand are so patently erroneous that the simultaneous issuance of a writ of certiorari and summary reversal are warranted.

The Court of Appeals reasoned that the Commission's order was presumptively valid and did not become suspect because it was challenged; that the order "was at all times binding upon the carriers until they successfully concluded a suit proving its invalidity" (App. A, p. 56a); and that the dismissal of the carriers' suit to set the order aside, albeit with-

out prejudice, was a determination of the merits of the controversy for the purpose of determining their liability to make restitution. Also significant in the Court's view was the fact that the carriers were denied an interlocutory injunction. As the Court saw it when the carriers failed to prove grounds sufficient for the grant of an interlocutory injunction they showed that the temporary restraining order should not have been granted, "at least to the extent of rendering [them] liable in restitution for benefits received under the temporary restraining order." (App. A, p. 58a).

The Court of Appeals argued that prior case law is consistent with its conclusion, citing *Arkadelphia Milling Company* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134 (1919) and *Ex Parte Lincoln Gas & Electric Co.*, 256 U.S. 512 (1921). In both of those cases suits to enjoin orders fixing rates were dismissed without prejudice, and restitution was required for the period during which the orders had been temporarily restrained. Those cases are plainly inconsistent with the holding here because in both of them there was a final determination that the orders temporarily restrained were in fact valid, and permanent injunctive relief was denied on that ground.[3] As the Court of Appeals said, speaking of *Arkadelphia*, this Court there held that "the [carriers'] failure to carry their burden of proof on the *permanent* injunction was itself sufficient to show that the temporary injunction should not have been allowed." (App. A, p. 58a; emphasis supplied). But as the court itself recognized, the denial

[3] So too, in every case the Court of Appeals discussed in which a court required restitution of monies which would not have been collected but for the restraint of a rate order there was a final determination that the rate order was valid.

of an *interlocutory* injunction shows only that the temporary restraining order should not have been issued "in the absence of a later decision in the carriers' favor on the merits" (App. A, p. 58a). Thus, its holding that no decision on the merits of the Commission's order was necessary is contrary to its own statement of the law.

The only explanation for the holding of the Court of Appeals in this respect is that it viewed the carriers' voluntary dismissal of their suit to permanently enjoin the Commission's order as a waiver of their right to a determination of the merits of that order. "Here the carriers by their own actions rendered the issues in the main suit moot and procured the dismissal." (App. A, p. 57a). This view is untenable in that it fails to distinguish between the carriers' complaint for an injunction and the shippers' counterclaims for restitution. The underlying issue on both the complaint and the counterclaims was of course the validity *vel non* of the Commission's order directing the cancellation of increased rates. The carriers, by cancelling those rates and establishing higher rates in lieu thereof, of course mooted their cause of action for an injunction and thus made unnecessary the resolution of that issue in their suit. But they did not by those actions moot the shippers' cause of action for restitution and make unnecessary the resolution of that issue in their suit. The District Court properly so held, saying: (App. B, pp. 65-66a)

> " * * * Obviously, in light of the record, the issues between plaintiffs and the Interstate Commerce Commission and the United States have become moot, and a dismissal should be granted unless the intervention of the intervenors with their counterclaims requires a finding of this court as

> to the merits of plaintiffs' action against the Commission as a condition precedent to the enforcement of said counterclaims. Certainly, this court has ancillary jurisdiction, at least as to the counterclaim filed. On the other hand, if upon the admitted facts the counterclaimants have no enforcible claims against plaintiffs or their surety, no purpose will be served in passing upon the merits of plaintiffs' complaint in that these entire proceedings would then be moot and plaintiffs' motions should be granted."

The District Court then went on to appraise the equities and concluded that the counterclaims should be dismissed for want of equity. There was therefore no need for it to determine the validity of the Commission's order and it did not do so. The Court of Appeals, appraising the equities differently, concluded that the counterclaims should not have been dismissed and reversed the District Court. Having done so, it necessarily revived the question of the validity of the Commission's order and made requisite a remand of the case to the District Court to answer that question.

The Court of Appeals sought to bolster its erroneous conclusion with what it called the general rule that the voluntary dismissal of a suit for injunction by the plaintiff without the consent of the defendant, even though without prejudice, is a determination of the merits of the controversy so as to render the plaintiff and his sureties liable on an injunction bond. It cited for this proposition an annotation in 91 ALR 2d 1312. (App. A, p. 57a) It is significant that the case that gave rise to the annotation, *Rice* v. *White*, 147 So.2d 204, 91 ALR 2d 1306 (Fla. App. 1962), holds to the contrary. Moreover, both *Rice* and cases

discussed in the annotation distinguish between the situation in which, on the one hand, the dismissal of a suit for injunction terminates all litigation of the subject matter between the parties and, on the other hand, the situation in which it does not. Thus, *Rice* emphasized that after the entry of the temporary restraining order a second suit was filed involving the same parties and the same subject matter, and that the first suit was dismissed so that the issues could be determined in the second.

Discussed also in the annotation is *Fort Madison R. Co.* v. *Hughes,* 137 Iowa 122, 114 N.W. 10 (1907), in which the situation was closely analogous to that here. In that case, the plaintiff, a street railway, brought suit for an injunction and got a preliminary order restraining the defendants from conducting moving operations which interfered with its use of its streetcar tracks. Defendants filed a cross bill for an order directing the plaintiff to remove obstacles in the path of their moving operations. Thereupon the plaintiff dismissed its suit for a permanent injunction. The court held that judgment for the plaintiff on the defendants' cross bill barred their recovery of damages from the plaintiff grounded on a claim that the temporary restraint of the defendants was improvidently issued. So here, when the shippers filed their counterclaims for restitution and the carriers filed their answers thereto issue was joined on the validity *vel non* of the Commission's order, independently of the joinder of that issue in the carriers' suit for an injunction. As the Court of Appeals correctly holds, a judgment on that issue in favor of the carriers would bar restitution. Hence, if the counterclaims are not dismissed that issue must be resolved.

Beatty v. *Casselman,* 115 Neb. 104, 211 N.W. 617 (1926), also discussed in the annotation, is to the same effect. That was a suit for damages on a bond given by the defendant as a condition to the issuance of a temporary injunction restraining the plaintiff from removing sand and gravel from certain premises. The plaintiff rested his case on the fact that the defendant had procured the dismissal of his suit for injunction without prejudice. The court held that the dismissal did not, of itself, determine that the plaintiff was rightfully removing sand and gravel from the premises described in the temporary injunction. It therefore held that the defendant was entitled to plead facts to show that the plaintiff had no right to do so. To quote the court:

> "If plaintiff had not acquired and did not possess the right to remove sand and gravel from that part of the premises from which he was enjoined, it could not be urged that he was entitled to damages because he was enjoined from doing something that he had no right to do."

In the case at bar the shippers themselves recognized that a determination of the validity of the Commission's order was necessary on the issue of their right to restitution. On that ground they opposed the carriers' motion to dismiss the suit for injunction as moot. The fact that the carriers successfully pressed their motion to dismiss does not estop them from pursuing their challenge to the validity of the Commission's order in defense against the counterclaims for restitution. At no time did they concede the validity of the Commission's order. On the contrary, they argued their challenge to the order and, as the District Court made clear, it would have ruled upon

that challenge had it not determined that the counterclaims should be dismissed even if the order were valid.

Question 2

Does a court have power to order restitution for damages caused by the restraint of an order of the Interstate Commerce Commission directing motor common carriers to cancel increased rates without a determination by the Commission that they were unjust and unreasonable or that they exceeded maximum reasonable rates during the period of the restraint?

To hold, as did the Court of Appeals, that, as a basis of restitution, it may determine what rate should have been established where the Commission had not itself found the increased rates to be unjust or unreasonable is to run contrary to established precedent. Yet this is what the court did when it said that had there been no temporary restraint of the Commission's order of cancellation "the last lawful preexisting rates are the effective rates to be applied by a court in considering restitution" (App. A, p. 20a). Even had there been no restraining order and had the carriers disobeyed the order of cancellation, the increased rates would have still been the only legally applicable rates.

The Commission has itself held in countless cases that the failure of carriers to comply with a rate order of the Commission does not render the legally published rate inapplicable, *Ralston Purina Co.* v. *Atlanta, B. & C. R. Co.*, 174 I.C.C. 722, 724; *Texas Produce Co.* v. *Illinois Central R. Co.*, 209 I.C.C. 113, 114; *National Erie Corp.* v. *New York Central R. Co.*, 237 I.C.C. 4, 5 and 6 (1940); *Bacon Bros.* v. *Alabama*

G.S.R. Co., 263 I.C.C. 587, 590 (1954); *Armour & Co.* v. *Atchison, T. & S.F. Ry. Co.*, 292 I.C.C. 269, 272-273 (1954). The principle thus adhered to by the Commission was long ago recognized by the Supreme Court, *Texas and P. R. Co.* v. *Cisco Oil Mill*, 204 U.S. 449 (1907). Indeed, the Commission itself has made it plain that the maintenance by carriers of a rate in violation of the Commission's order does not *per se* give rise to a right to reparations. As a prerequisite to reparations there must be a finding by the Commission of the extent to which the rate exceeded the maximum reasonable rate.

In *Kansas City Fuel Oil Co.* v. *Atchison T. & S.F. Ry. Co.*, 210 I.C.C. 134 (1935) at page 136, the Commission said:

> "A rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate. *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry. Co.*, 185 I.C.C. 233. Even if we were to assume that section 15 of the act was violated by defendants, reparation could not be awarded to complainants. Penalties or fines for such a violation are enforceable in the courts and accrue to the Government. *Hudson Mule Co.* v. *L. & N. R. Co.*, 129 I.C.C. 365, 371."

In its opinion (App. A, pp. 51a-52a) the Court of Appeals seeks to avoid the thrust of the foregoing decisions, and even to find support for its award of restitution by stating:

> "In every single case * * * where a timely action was brought by the shippers, and *where the carriers published tariffs which were found to have violated a Commission order, the Commission ordered reparations.*"

Most certainly the fact that the Commission ordered reparations in those cases gives no basis for restitution here. The Court of Appeals completely overlooks the fact that in those cases where reparations were awarded there was a prior Commission determination that the charges collected were unreasonable by a specified amount. The only teaching of these cases is that Commission orders prescribing rates or ordering rates to be cancelled do not in themselves effect a change in rates, and where carriers maintain rates in violation of such orders the violation itself is not a ground upon which reparations can be granted. Nor may restitution, as distinguished from reparations, be awarded without a determination by the Commission fixing the measure thereof in terms of maximum reasonable rates.

It is fundamental that a "zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." Absent some other unlawfulness, e.g., unjust discrimination, a carrier is entitled to establish such rates within the zone of reasonableness as to it seems wise. *U. S.* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 506 (1935). It is equally fundamental that only the Interstate Commerce Commission can determine whether particular rates are above the zone of reasonableness, i.e., exceed maximum reasonable rates. *T.I.M.E. Inc.* v. *U. S.,* 359 U.S. 464 (1959); *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907). It follows that a shipper cannot recover from a carrier any part of freight charges paid on the basis of legally filed and published rates unless and until there has been a determination by the Commission that those rates exceed maximum rea-

sonable rates at the time the transportation to which they applied was performed. The Court of Appeals itself recognized these fundamental principles. It noted that "carriers may charge to shippers only the rates specified in [their] published tariffs." (App. A, p. 3a). And it was at pains to point out that it was "not expressing any affirmative judgment that the [increased rates the Commission ordered cancelled were] in any substantive way violative of the Act—e.g., that they [were] unreasonably high or discriminatory. Such a judgment lies solely within the province of the Interstate Commerce Commission." (App. A, pp. 14a-15a)

Nevertheless, the Court of Appeals, flying in the face of these principles, undertook to do what this Court has held is beyond its province, namely "to absorb to itself" the function of rate-making. *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U.S. 282, 286 (1934). The order of the Interstate Commerce Commission directing the cancellation of the increased rates at issue was not based upon a finding that those rates exceeded maximum reasonable rates. Nor was there any suggestion by the Commission, much less a finding, as to what rates could have been established in lieu of the rates ordered cancelled. While the court expressly recognized that there was no implication that the rates ordered cancelled were unlawful in any substantive sense either before or after the order of cancellation, its decision resulted in indirectly declaring those rates to be in excess of maximum reasonable rates during the period of restraint to the extent that they exceeded the pre-existing rates. Thus, it stated the question before it as whether the shippers were en-

titled to restitution for rates which "were higher than *could* be charged" but for the temporary restraint. (App. A, p. 8a; emphasis supplied). Again, it said that its task was to "determine whether, if the [Commission's order] went into effect, either because of carrier compliance or judicial enforcement, the result *would* be a reduction in the tariffs." (App. A, p. 10a; emphasis supplied). It then went on to determine that the only rates that "could have been charged" but for the temporary restraint were the immediately prior lower rates, and that, had the Commission's order gone into effect, the result would have been a reduction in rates to the immediately prior lower rates. (App. A, p. 29a). Thus, contrary to the statement in its opinion (App. A, p. 40a), the court here has adjudicated an issue within the primary jurisdiction of the Interstate Commerce Commission, as to which there has been no finding whatever by the Commission itself. (See App. C)

While the court conceded that there "is no case law on the subject" (App. A, p. 16a), it found "an analogy" in *Chicago, M., St. P. & P. R. Co.* v. *Alouette Peat Products Ltd.*, 253 F. 2d 449 (9th Cir. 1957), which it viewed as supporting the proposition that "the last lawful pre-existing rates are the effective rates to be applied by a court in considering restitution." (App. A, pp. 19a-20a). *Alouette* is wholly inapposite. In that case the Commission gave the railroads special permission to make effective on five days' notice specific increased rates on peat. The railroads published, filed and made effective on five days' notice increased rates in excess of those authorized. The court held that the higher increases, having been

made effective on less than thirty days' notice without permission, had not been legally established and that the "only existing legally established" rates were the prior rates. 253 F. 2d at 456. In other words, the court held that the illegally filed increased rates never became legal rates and that, therefore, the carriers had no legal right to collect them in the first instance even though, as the Commission had found, they did not exceed maximum reasonable rates. That is not the situation here. The increased rates here were legally established and thus supplanted the prior rates. As the Court of Appeals itself said, the carriers had the legal right to collect those increased rates during the entire period they were effective, including the period of the temporary restraining order. Hence, the prior rates were not, as they were in *Alouette,* the "only existing, legally established" rates, and thus that case has no applicability to the one at bar. The carriers here having legally collected the increased rates, are entitled to keep the proceeds thereof unless those rates exceeded maximum reasonable rates.

The Court of Appeals in effect recognized that the right to restitution its judgment would vindicate is the right to the recovery of freight charges to the extent that the rates on which those charges were based exceeded maximum reasonable rates. Thus, in rejecting the carriers' argument that the shippers' remedy by way of suit for reparations was available and exclusive, it held that the allowance of restitution was a permissible and preferable substitute because, inter alia, "[t]o remit the shippers to [their statutory remedy for reparations] would require the filing of a new lawsuit, a reference to the Commission, and subsequent judicial proceedings on the Commission's findings." (App. A, p. 41a). The reference to the

Commission would of course be for the purpose of securing its determination of the extent to which the increased rates ordered cancelled exceeded maximum reasonable rates, which is a prerequisite to an award of reparations. Plainly, if a remedy in restitution is a permissible substitute for a remedy in reparations, a reference to the Commission for such a determination is just as much a prerequisite to an award of restitution.

The conceded fact that the Commission did not determine whether the increased rates it ordered cancelled exceeded maximum reasonable rates distinguishes this case from all of those in which this Court has awarded restitution to shippers on the basis of the judicial restraint of a rate order. In all of those cases the situation was as in *Arkadelphia, supra,* that is, every order restrained fixed specific rates lower than those collected. Hence the measure of the damages caused by the collection of higher rates under the restraint was known.[4] The measure of damages is not known here and cannot be known without a determination by the Commission of the extent to which, if at all, the increased rates it ordered cancelled exceeded maximum reasonable rates.

The holding of the Court of Appeals that the measure of damages in restitution is the difference between the increased rates ordered cancelled and the immediately prior rates is inconsistent with the principle of this

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[4] So too, in *Accelerated Transport-Pony Express, Inc.* v. *U.S.,* 227 F. Supp. 815 (D.C. Vt. 1964), aff'd 379 U.S. 4 (1964), the Commission found certain of the carriers' rates "not shown to be just and reasonable because certain charges for short hauls were higher than those for long hauls" and ordered them cancelled *"to the extent of* [*the*] *discrepancy."* (App. A, p. 28a; emphasis supplied). Thus, the measure of damages was established by the Commission.

Court's holding in *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301 (1935). Pointing out that a cause of action for restitution is equitable in origin and function, this Court said: (295 U.S. at pp. 309-310)

> "* * * The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. . . . The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. * * *"

In *Atlantic Coast Line* the shippers paid higher intrastate rates than those prescribed by Florida under an order of the Interstate Commerce Commission directing them to do so to eliminate discrimination against interstate commerce. This Court held the Commission's order invalid for lack of necessary findings. Suit for restitution for monies collected by virtue of the Commission's invalid order was brought, grounded on the fact that but for that invalid order those monies would not have been collected. This Court nevertheless denied restitution. Its rationale was that a subsequent valid order of the Commission prescribing the same rates established that the rates collected by virtue of the invalid order were in fact no higher than the rates the shippers should have paid.

In short, *Atlantic Coast Line* held that a right to damages in restitution did not arise merely because higher rates were paid by virtue of an order of the Interstate Commerce Commission that should not have been issued. A further inquiry was necessary, namely, an inquiry whether the lower intrastate rates were in fact discriminatory against interstate commerce. That

inquiry having been made by the Commission and it having found that they were, restitution was denied. So here, a right to damages in restitution does not arise merely because higher rates were paid by virtue of a temporary restraining order of the District Court that should not have been issued.[5] A further inquiry is necessary, namely, an inquiry into the extent to which, if at all, those higher rates exceeded maximum reasonable rates. That inquiry not having been made by the Commission, the case must be referred to it in order to enable it to do so.

In this case both the District Court and the Court of Appeals recognized that, as this Court held in *Atlantic Coast Line,* the right to restitution turns on an appraisal of equities. The District Court concluded that the counterclaims should be dismissed for want of equity because it interpreted the Commission's action in postponing the effective date of the order of cancellation after the dissolution of the temporary restraint and in subsequently permitting still higher rates to be established as a determination that the rates ordered cancelled did not exceed maximum reasonable rates. The Court of Appeals was of the view that no such conclusion could be drawn from the Commission's actions. In addition, the Court of Appeals was of the view that whatever the reasons for the Commission's order postponing the date for complying with its order of cancellation, that postponement would not "affect the restitutional rights of the parties during the period when the court had jurisdiction of the case." (App. A, p. 60a) The court's

[5] As we have shown in our discussion of Question 1, a determination of the merits of the Commission's order is necessary before it can be determined whether the temporary restraint was in fact improvidently issued.

view is in error, because there were in this case no findings by the Commission that the rates ordered canceled were in specific violation of the Act. Indeed, the court itself recognized this, and for that reason *Inland Steel Co.* v. *U. S.*, 306 U.S. 153 (1939), upon which the court relied, does not support its holding. In that case this Court held that restitution could be granted notwithstanding that the Commission had postponed the effective date of its order after the court had restrained it. But its holding rested on the fact that there was indeed an unchallenged determination by the Commission that the monies paid by virtue of the judicial restraint of its order were in fact paid in violation of the Interstate Commerce Act.

In summary, both courts below based their opposite conclusions on speculation as to what rates the Commission thought were maximum reasonable rates during the period of the temporary restraint. But no court has authority either to determine whether rates exceed maximum reasonable rates or to speculate as to what the Commission's actions meant. It follows that no determination of whether any damages are due, nor the amount thereof, can be made until there has first been a determination by the Commission as to what rates would have been maximum reasonable rates during the period of the temporary restraint.

PRAYER

For all of the foregoing reasons Petitioners pray the Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and upon review of the record in that Court, to reverse its judgment and remand the case to it with directions that it remand the case to the United States District Court for the District of Minnesota with directions to

determine whether or not the order of the Interstate Commerce Commission requiring the cancellation of the increased rates at issue was valid, and, if it finds that it was, to refer the case to the Interstate Commerce Commission for a determination as to what rates were maximum reasonable rates during the period of the temporary restraint of the Commission's order.

Respectfully submitted,

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February 16, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

Oct. 6, 1970.

No. 19863.

MIDDLEWEST MOTOR FREIGHT BUREAU ET AL., *Appellees,*

v.

UNITED STATES OF AMERICA, *Appellant.*

No. 19870.

MIDDLEWEST MOTOR FREIGHT BUREAU ET AL., *Appellees,*

v.

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., *Appellants.*

* * * * * * * * * * *

Donald L. Horowitz, Atty., Dept. of Justice, Washington, D. C., for appellant the United States; William D. Ruckelshaus, Asst. Atty. Gen., and Alan S. Rosenthal and Norman G. Knopf, Washington, D. C., on the briefs.

Arthur A. Arsham, New York City, for appellants, The National Small Shipments Traffic Conference, Inc., and others; John J. C. Martin, New York City, and Richard A. Bowman, Minneapolis, Minn., on the briefs.

Harold C. Evarts, Minneapolis, Minn., for appellees, Middlewest Motor Freight Bureau, and others; George D. Michalson, Kansas City, Mo., and Roland Rice, Washington, D. C., on the briefs.

Before VOGEL, Senior Circuit Judge, and GIBSON and BRIGHT, Circuit Judges.

GIBSON, Circuit Judge.

This is a consolidated appeal by the United States in its capacity as a shipper (No. 19,863) and by other intervening shippers (No. 19870) (hereinafter collectively referred to

as shippers) from the judgment of a Three-Judge District Court in the District of Minnesota denying them restitution for excessive rates charged by appellees Middlewest Motor Freight Bureau and its operative interstate trucking carriers (hereinafter collectively referred to as carriers).

Initially the carriers sued under 28 U.S.C. § 2325 and other applicable statutes to enjoin the Interstate Commerce Commission's order canceling their then existing rates. This action called for the convening of a Three-Judge District Court. After obtaining a temporary restraining order from the district judge, the carriers were denied an interlocutory injunction against the ICC order and later requested and secured dismissal of their injunction request on the ground of mootness. In the meantime, the shippers had intervened in the action and had filed counterclaims for alleged excessive freight rates charged during the period of September 13 to 29, 1965, when, but for the intervention of the temporary restraining order, the ICC's order canceling the rates would have been in effect. According to the brief of the National Small Shipments Traffic Conference, Inc., et al., the rate increases were estimated to amount to a minimum of $70,000 per day, making the cost to the public and the concerned shippers for the period involved at least $1,190,000. The shippers contend this amount should be restored to them or to the various shippers who were forced to pay the increased rates by reason of the court's restraint of the ICC order. The carriers contend they are entitled to the rates collected for reasons hereafter discussed.

An understanding of the facts of this controversy requires a brief explication of the regulatory scheme established by Congress by which rates of carriers of goods shipped in interstate commerce are determined. According to the provisions of the Interstate Commerce Act, 49 U.S.C. § 316 et seq., carriers are required to establish

"just and reasonable rates" to be charged to shippers of goods. These rates are established by the carriers' filing with the Interstate Commerce Commission tariffs (schedules) of the rates, fares, and charges to be applied by the carriers. The tariffs must be published as required by Commission regulations. The carriers may charge to shippers only the rates specified in the published tariffs. The tariffs, as filed and published by the carriers, are effective, unless the Interstate Commerce Commission finds in an administrative proceeding that they are not shown to be just and reasonable or that they are otherwise violative of the Act; but the Commission itself does not determine rates. If, after the various administrative procedures are followed, the Commission issues a final order rejecting a carrier's tariff, there are three options open to the carrier to determine its operating rates: (1) it may revert to the immediately prior published tariff; (2) it may file a new tariff with the Commission, with higher or lower rates, and thus begin the administrative process anew; or (3) it may seek judicial review of the Commission's order. In conjunction with this last option, an interlocutory or permanent injunction may be sought staying the Commission's order, in which case a three-judge district court must be convened under 28 U.S.C. § 2325.

Because the initiative for determining effective rates rests with the carriers and not with the Interstate Commerce Commission, and because the various administrative and judicial proceedings required to reach a final determination of the lawfulness of the carriers' rates are exceedingly complex, it often happens that in the interim between the filing of a tariff and the final disposition of that tariff, the carriers charge rates which are higher than ones to which they are entitled. In such a situation, the question arises of what remedies, if any are available to shippers who have paid the higher rates. In this case we consider aspects of that pragmatic question.

I. STATEMENT OF THE CASE

The carriers filed tariffs with the Interstate Commerce Commission containing increased rates and charges on less than truckload (LTL) shipments and any quantity shipments in middlewest and central territories which were to take effect July 1, 1963.[1] Upon the filing of a complaint by the shippers, the Commission suspended the new tariffs and ordered an investigation. Then on September 7, 1963, the suspension order was vacated by the ICC and the increased rates were permitted to take effect, but the investigation and hearing on the lawfulness of the tariffs was continued. The Commission issued its final report and order on February 24, 1965, finding that "the proposed increases are not shown to be just and reasonable," and ordering the tariffs canceled. The basis underlying the Commission's report and order was that the carriers had not met their burden of proof under 49 U.S.C. § 316 (g) justifying the increase in rates. *LTL Class Rates & Minimum Charges between Midwest and Central Territories,* 325 I.C.C. 106 (1965).

The effective date of the original order was April 14, 1965, but the carriers obtained several postponements of the order until an ultimate compliance date of September 13, 1965, was set. Throughout this period, the carriers had ample time to publish new tariffs with a statutory 30-day notice requirement, but failed to do so. On August 30, 1965, the ICC denied any further postponement of the compliance date. At this point, the carriers had the option of complying with the order or seeking judicial review. They chose review.

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[1] The proposed rates have application between, to, or from points in Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming.

On September 9, 1965, the carriers filed suit against the Government and the Commission to enjoin enforcement of the order, which was to take effect September 13. The district judge pursuant to 28 U.S.C. § 2284(3) issued a temporary restraining order and required the carriers to post a bond in the amount of $200,000 (later increased to $300,000) for the payment of damages in case the order was wrongfully restrained.

The private shippers who had participated in the Commission proceedings sought and were allowed to intervene as parties defendant to oppose the injunction against the ICC order, and were also allowed to file counterclaims against the carriers for damages arising out of the operation of the temporary restraining order on the ICC's order of cancellation of the rates under review. The basis of the counterclaims was that the shippers were compelled to pay higher rates during the period of the temporary restraining order than they would have if the cancellation order had gone into effect. Later the Government was allowed to intervene in its capacity as a shipper and filed a similar counterclaim.

On September 24, 1965, the Three-Judge Court was convened to hear the carriers' motion for an interlocutory injunction against the ICC order. The motion was denied, but the temporary restraining order was continued in effect until September 29, 1965, to permit the drawing up of findings and a final order. On September 29, the Three-Judge Court issued its findings of fact and conclusions of law denying the interlocutory injunction and dissolving the temporary restraining order. The decision rested primarily on three grounds: (1) the carriers failed to demonstrate a reasonable probability that the Commission's order would be overturned; (2) the carriers had administrative remedies which would enable them to obtain increased rates; and (3) the magnitude of the loss to the public, combined with the "remote possibility" of the

carriers' success, justified denial of the interlocutory injunction.

At this point in the litigation, the carriers found themselves in an uncomfortable legal situation. They were required by statute to charge only published tariffs, and they had published none other than those now effectively ordered canceled by the ICC. If they charged these tariffs, they faced the possibility of criminal sanctions under 49 U.S.C. § 322. If they charged new unpublished tariffs, even lower ones, they also incurred the possibility of criminal sanctions under that section. Whether or not this assessment of their legal position is in fact accurate is not material to this decision, but it nevertheless was a motivating factor in the further proceedings which ensued.

The carriers immediately made an *ex parte* application to the Commission seeking another postponement of the cancellation order. On September 30, the Commission postponed the effective date of the order to October 11, without further change in the order, and also expressly required only one day's [2] notice and publication of the pre-existing lower rates. On October 5, the carriers filed a new tariff to take effect November 16, 1965, with rates which were even higher than those in the controverted tariff. On October 11, the carriers complied with the cancellation order and published the pre-existing lower rates of May 1964. The increased rates in the October 5 schedules went into effect on the scheduled date of November 16, 1965.[3]

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[2] Under regular procedure 30 days notice would be required. 49 U.S.C. § 317(c).

[3] These increased rates were converted by the carriers from per-shipment charges to hundred-weight rates to take effect May 1, 1966. These rates were ordered suspended and investigated. Substitute tariffs were published to take effect September 1, 1966. These also were ordered suspended and investigated. The suspended matter was canceled and the proceedings were discontinued April 11, 1967, without issuing any findings or order.

The pendency of the suit in the Three-Judge District Court now presented a problem to the carriers. The denial of the interlocutory injunction strongly suggested that they had only a slight chance of winning their case on the merits. If they proceeded to a hearing on the merits and lost, they would be liable on the bonds for a substantial amount of damages. Since they already had higher rates in effect which were no longer under investigation by ICC action, they proceeded to seek dismissal of the suit on the ground of mootness.

On September 5, 1968, the Three-Judge District Court on motion of the carriers dismissed the suit and counterclaims and discharged the bonds on the grounds that the rate increases mooted the issue of the validity of the cancellation order as between the ICC and the carriers. As to the shippers' counterclaims, the Court held that the ICC order of September 30, 1965, postponing the compliance date with the cancellation order to October 11, was retroactive to the original September 13 compliance date; thus there was no effective cancellation order during the period of the temporary restraining order (September 13 to September 29), and consequently the shippers were not injured and had suffered no damages which could be awarded by virtue of the operation of the temporary restraining order.

Following the issuance of the decision, the Government as statutory defendant and the Interstate Commerce Commission filed a joint statement with the court in which they denied that the September 30 order had any retroactive effect, contending that it was issued solely because of the court's stay of the original compliance date. In the light of this statement, the Three-Judge Court amended its original decision and accepted the Commission's position that there was no retroactive effect of the September 30 order, but concluded that the equities of the situation did not justify the granting of any relief to the shippers.

The question presently on this appeal is a relatively narrow one, namely whether the shippers are entitled to

restitution from the carriers for the rates which were charged during the existence of the temporary restraining order, which rates were higher than those which could have been charged had the cancellation order gone into effect at the original compliance date of September 13.

II. Jurisdictional Statement

Neither party to this appeal has challenged our jurisdiction, but because of the rather unusual circumstances of the case, a brief jurisdictional statement is appropriate.

The Three-Judge District Court below was convened pursuant to 28 U.S.C. § 2325 for the purpose of reviewing and considering the issuance of an injunction against the ICC order. Following the denial of the interlocutory injunction in September 1965, the carriers did not pursue judicial review of that order, but initiated new administrative proceedings before the Commission by filing new increased rates which became effective November 16, 1965. In September 1966, they moved in the District Court to strike the shippers' counterclaims and dismiss the suit on the grounds that the questions were now moot. The district judge denied the motion for the reason that the ancillary jurisdiction of the court had attached to determine the validity of the counterclaims, whose origin of course lay in the issuance of the temporary restraining order; the court reasoned that determination of the counterclaims required resolution of the validity of the ICC order. Accordingly, the Three-Judge Court convened in July 1968, to hear the merits of the suit, at which time the carriers again urged dismissal of the suit on the grounds of mootness. By its order of September 5, 1968, as modified by the further order of April 9, 1969, the Three-Judge District Court dismissed the suit as moot and denied the shippers' counterclaims on the grounds of a want of equity.

The private shippers perfected a direct appeal to the United States Supreme Court from the order of the Three-

Judge Court and also a protective appeal to this court. The Government *qua* shipper appealed only to this court. The carriers, the Government as statutory defendant, and the ICC moved to dismiss the direct appeal as moot, and the Supreme Court dismissed it for want of jurisdiction. National Small Shipments Traffic Conference, Inc. v. Middlewest Motor Freight Bureau, 396 U.S. 111, 90 S.Ct. 395, 24 L. Ed.2d 304 (1969). This appeal is properly before us under the principles of Public Service Commission of Missouri v. Brashear Freight Lines, Inc., 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083 (1941).

[1] Under the principles of that case, the proper procedure in this case would have been for the Three-Judge District Court, upon dismissing the case against the ICC for mootness, to have referred the counterclaims for restitution to a single judge for disposition, as the claim for damages raised questions not within the statutory purpose of a three-judge district court. Nevertheless, the failure to follow this procedure does not invalidate the judgment, but merely renders a direct appeal to the Supreme Court under 28 U.S.C. § 1253 inappropriate, and review is properly in this court.

III. Construction of the ICC Order

At the outset we must consider the construction and effect of the ICC order. The carriers contend that the ICC order neither rendered the tariff unlawful nor compelled a reduction in rates. If this contention is sound, then there is no need to consider the question of restitution, for there would be nothing to order restitution for. Unfortunately, because of the procedural posture of this case, we do not have the benefit in this Court of the presence of the Commission itself, since its immediate interest in the case was terminated with the denial of the interlocutory injunction. Therefore, in order to reach a decision on the issue, we must rely on the meager case law available and an analysis of the pertinent parts of the record. Neither

party has referred us to any pertinent cases, though our own search has revealed a few indirectly relevant.

As a preliminary matter, it is necessary to make clear that in this part of the opinion we are dealing *only* with the construction and effect of the ICC order as it would operate as a valid administrative order. The lawfulness of the order is no longer at issue, and it must therefore be presumed valid. Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 512, 64 S.Ct. 1129, 88 L.Ed. 1420 (1944). Nor is it material for purposes of this discussion that the carriers were allowed to collect the tariffs which were ordered canceled during the period of the temporary restraining order. The right to make that collection is not denied. Whether they have the right to keep the charges so collected is an entirely different matter, to be discussed below with reference to the availability of restitution. We must here determine whether, if the order went into effect, either because of carrier compliance or judicial enforcement, the result would be a reduction in the tariffs.

The proceedings involving this tariff arose under § 216 (g) of the Interstate Commerce Act, 49 U.S.C. § 316(g), which provides in pertinent part as follows:

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, * * * the Commission is authorized and empowered upon complaint of any interested party * * * to enter upon a hearing concerning the lawfulness of such rate, fare, or charge. . . . * * * At any hearing involving a change in a rate, fare, charge, or classification, * * * the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable."

When the carriers in this case filed their increased rates, the shippers filed a complaint protesting the increases and the ICC commenced a hearing under the above section. The proceeding terminated approximately 18 months later when the ICC issued its final order requiring the tariffs to be canceled. The grounds for this order were that the carriers had not sustained their burden of proof and had thus not shown that the schedules were just and reasonable.

At this point, explanation of the differences possible among various ICC orders in rate proceedings of this sort provide some illumination of the problem we face. There are numerous reasons why a tariff may be unlawful under the Interstate Commerce Act. A rate may be unlawful because it is unreasonable—e. g., it is too high to be just or too low to be compensatory. A rate, even though reasonable, may be unlawful because it is discriminatory —e. g., shippers similarly situated are charged different rates, each of which by itself might be reasonable. A rate, even though reasonable and nondiscriminatory among shippers, may be unlawful because it is prejudicial to other interests the Act protects—e. g., it threatens the solvency of competing forms of transportation. A rate, even though reasonable, nondiscriminatory, and nonprejudicial, may nevertheless be unlawful because it is not filed in accordance with the terms of § 317(a). Further variations on this theme might be orchestrated but are not necessary for our immediate purpose. The variation with which we are concerned is whether a rate that is not shown to be just and reasonable is unlawful. We believe it is.

[2] The premise of this conclusion is the requirement of § 316(g) that the burden of proof is upon the carrier to justify any change in rates. The concept of burden of proof is a highly varying one depending on the circumstances of the issues involved; often it is merely a procedural rule which determines which party has the duty of producing evidence on a particular question. But often the concept is a far more significant one involving basically

problems of substantive law. *See* 2 Davis, Administrative Law Treatise § 14.14 (1958). We think the instant statutory requirement is clearly substantive in nature, for the following reasons.

[3, 4] The Commission may order a tariff canceled solely on the grounds that the carriers have failed to meet their burden of proof, provided of course that the requisite findings are made to support the order. Chicago & E. I. R. Co. v. United States, 107 F.Supp. 118 (S.D.Ind. 1952), aff'd 344 U.S. 917, 73 S.Ct. 346, 97 L.Ed. 707 (1953). This is true even where the carriers have offered a considerable volume of evidence in support of the tariff. (This appears to have been conceded by the carriers in the proceedings below and is not contested here; their challenge to the validity of the Commission's order was not that they had met their burden of proof under the appropriate standards, but that the Commission had changed these standards without affording them sufficient notice.) Thus the burden of proof requirement under this statute is not merely a procedural one requiring the carriers to produce some evidence justifying their changed tariffs. The proof they offer must be sufficient to positively justify the tariffs.

[5] The carriers contend that even though they have failed to meet their burden of proof, the tariff in issue is nevertheless lawful. That conclusion would not follow, even if they *had* met the burden of proof for purposes of § 316(g). For it is well established that when the Commission holds a hearing on the lawfulness of a tariff and refuses to cancel it, even with a specific finding that it is not shown to be unlawful, it is not thereby converted into a lawful tariff. "* * * [T]hey stand only as carrier-made rates which * * * leaves them open to possible recovery of reparations." Interstate Commerce Commission v. Inland Waterways Corp., 319 U.S. 671, 687, 63 S.Ct. 1296, 1305, 87 L.Ed. 1655 (1943). If the fact that the carrier sustains its burden of proof sufficiently to convince the Commission to allow the tariffs to stand as carrier-

made rates does not thereby convert them to lawful rates, it is self-evident that where the proof fails even to justify them as carrier-made rates and the Commission orders them canceled, they cannot be lawful.

[6] To sustain the carriers' contention on this issue would mean that the Commission could order *lawful* rates canceled. That of course is contrary to the whole scheme of the rate-making process under the Interstate Commerce Act. The rationale of that process is that the carrier has the right to fix its own rates at any level it sees fit, so long as it complies with the terms of the Act and is, upon challenge, able to show that its rates are just and reasonable. The Commission, proceeding under § 316(g), investigates the *"lawfulness"* of the rates. Hence, if the Commission orders a tariff canceled, it must be because it was unlawful. If a tariff may be canceled because the carrier failed to sustain its burden of proof, then that failure must render the tariff unlawful.

It must be emphasized that we are here dealing with the lawfulness of the tariff following the effective date of the Commission's cancellation order. If the cancellation order, based on the finding that the tariffs were not shown to be just and reasonable, did not mean that the tariffs *for the future* would be unlawful, then the entire proceedings would be meaningless. The Commission did not let the tariffs stand as "carrier-made rates." Nor did it, as it has in some cases, order the tariffs canceled without prejudice to their amendment. *See* Accelerated Transport-Pony Express, Inc. v. United States, 227 F.Supp. 815 (D.Vt.), aff'd, 379 U.S. 4, 85 S.Ct. 43, 13 L.Ed.2d 21 (1964). Nor did it leave open to the carriers the option of producing additional evidence to justify these tariffs. Positive cancellation was required.

Cases dealing with orders of the Commission in this form have not addressed themselves specifically to this question of whether the tariffs ordered canceled were thereby

rendered unlawful. Nevertheless, they seem to have proceeded upon this assumption, consistently with the above discussion. Language from the following two cases is indicative of this approach:

> "Upon submission and study the Commission reported that the new classification was *unlawful,* saying:
>
> 'We conclude that the respondents [carriers] have failed to sustain their statutory burden of proof.
>
> 'We find that the proposed changed rating has not been shown to be just and reasonable.' "

Overnite Transportation Co. v. United States, 266 F.Supp. 88, 90 (E.D.Va. 1967) (emphasis added).

> "But where, as here, the carrier has presented impressive evidence to support the proposed rate, the Commission may not hold the rate *unlawful* upon the mere statement that the carriers have not sustained their burden of persuasion." New York Cent. R. Co. v. United States, 99 F.Supp. 394, 401 (D.Mass.), aff'd 342 U.S. 890, 72 S.Ct. 201, 96 L.Ed. 667 (1951) (emphasis added).

See also Ringsby Truck Lines, Inc. v. United States, 263 F.Supp. 552 (D.Colo. 1967), app. dis., 389 U.S. 576, 88 S.Ct. 689, 19 L.Ed.2d 775 (1968); Baltimore & O. C. T. R. Co. v. United States, 279 F.Supp. 270 (N.D.Ill.), aff'd, 389 U.S. 88, 88 S.Ct. 253, 19 L.Ed.2d 255 (1967).

[7] Due to the technicality of the concepts involved, as well as the distinct possibility of future misinterpretation of the import of this decision, it seems necessary here to expressly limit the sense in which we are applying the term "unlawful" to these tariffs. In holding that the tariffs are unlawful, we are not expressing any affirmative judgment that the rates embodied in them are in any substantive way violative of the Act—e. g., that they are unreasonably high or discriminatory. Such a judgment

lies solely within the province of the Interstate Commerce Commission. Nor does this holding imply that the tariffs were unlawful in any sense whatsoever *prior* to the Commission's final order. This issue is not before us in this case, limited as we are solely to the period of the temporary restraining order following the effective date of the final order (September 13 to 29, 1965). Nor does the term "unlawful" in this context mean that the carriers could not collect the rates in the tariff during the period of the temporary restraining order; that they may or may not keep them after collection is discussed below in regard to the availability of restitution. The conclusion that the tariffs were unlawful is restricted to the sense that by virtue of the Commission's cancellation order, as it operated prospectively, the carriers no longer had the right to maintain that particular tariff; maintenance of the tariff in violation of the order was unlawful.

[8] Having concluded that the cancellation order rendered the particular tariffs here in issue unlawful, we are next faced with the question of what was the actual effect of the order on the rates which the carriers could charge. The carriers contend that the effect of the order did not require them to reduce their rates. We pause to note here that, prior to the carriers' raising this contention on appeal, there appears to have been absolutely no confusion on anybody's part as to the meaning of the Commission's order. The carriers, the shippers, the Commission, the Government, and the trial court all operated on the assumption that the effect of the Commission's order was to require the carriers to cancel the increases and to revert, for some period of time at least, to the immediately prior rate levels. The insistence of the carriers now that the order did not require such a reduction is disingenuous, to say the least. Under normal circumstances, we would not feel obliged to deal with such a contention raised for the first time on appeal, especially where it is directly contrary to all the proceedings below. Nevertheless, since the pro-

ceedings below were focused primarily on the validity of the Commission's order, rather than the problems of restitution, we feel constrained to examine the issue briefly. There is no case law on the subject to which we have been directed by the parties, nor have we found any. Lack of authoritative decisions indicates an accepted interpretation of the regulatory scheme whereby failure to justify rate increases accompanied by an order of cancellation would result in a reduction in rates.

First, account may be taken of the Commission's proceedings in this case. The order of investigation which initiated the proceedings, dated June 28, 1963, was directed at the proposed *increased* less-truckload rates. In its final report, reported at 325 I.C.C. 106 (1965), the Commission made clear that its findings were directed solely at the carriers' increases. "The increases became effective on September 7, 1963, and will be referred to herein as the proposed increases." *Id.* at 107. In the discussion section, the Commission again emphasized its concern, not with overall high rates, but with carrier increases:

> "Numerous motor carrier general increase proceedings involving strong shipper opposition have been considered in the past several years. As a consequence the evidence presented to justify a general increase in rates has been subjected to close scrutiny. * * * [T]he evidence is not convincing that this less-than-truckload traffic, which generally is not susceptible of diversion to other modes of transportation, should be subjected to an additional increase barely 1 year after the last increase became effective." *Id.* at 121-122.

The Commission's specific finding was that the "increases are not shown to be just and reasonable." And the final order, dated August 31, 1965, denying further postponements and rehearings, again said that the "proposed *increases* found not shown to be just and reasonable have been ordered cancelled."

It is quite evident from this that the Commission order did not mean that the carriers' entire rate structure was not just and reasonable, but only that the most recent increase was not shown to be just and reasonable. The obvious conclusion to be drawn is that the increases to be canceled would leave the carriers with the rate structure as it existed just prior to the increases. That the carriers understood this exactly is clear both from the letter written to the Commission by carrier's Attorney Feldman on August 30, 1965, and by their subsequent court suit.

In their complaint filed instituting a suit against the Commission order and applying for a temporary restraining order, the carriers specifically alleged that the order "requiring cancellation of *increased* rates and minimum charges to become effective September 13, 1965, would cause irreparable injury to plaintiffs * * *." (emphasis added). In the affidavit in support of the motion for the temporary restraining order, the carriers reiterated the charge that the cancellation of the *increases* would cause irreparable damage, and presented specific figures indicating their financial position if the increases were left in their rates compared to the effect of omitting them from the rates if the order went into effect. Further explication of the extensive evidence in the record to this effect is unnecessary to this opinion.

Finally we take specific note of the findings and order entered by the Three-Judge Court denying the interlocutory injunction, Order of September 29, 1965. Throughout this order, the court consistently refers to the rate increases. Of specific interest here is the finding VII(c):

> "That the balancing of the equities in considering the magnitude of the losses and injury to the public if the interlocutory injunction is granted and if the Commission's order is sustained by the Court, as compared with the losses to the carriers if the injunction is not granted, with the remote possibility of the Commis-

> sion's order being set aside, adequately justifies this Court, on this showing, in denying the motion for an interlocutory injunction."

This finding is obviously based on the premise that the Commission's order requires a reduction in the carriers' rates. Otherwise there could be no losses to the public.

Despite this seemingly unanimous agreement by all parties in the trial litigation that the Commission order required cancellation of the rate increases, resulting in a reversion to the prior rate levels, the carriers now insist on appeal that that was not the effect of the Commission order. Just exactly what was the effect of the order in the carriers' view is left uncertain, but the import of their position as quoted here leaves open several possibilities:

> "The tariff schedules at issue were not 'rate increase schedules' as repeatedly characterized by the shippers * * * —but all schedules—and there then left no underlying, pre-existing schedules of rates and charges which would automatically have become effective upon cancellation of the schedules which are the subject of the case at bar. In other words, the challenged Commission order did not direct cancellation of merely an increase, or add-on, leaving an underlying rate structure, but swept away all basis for *any* charges for transportation services." (Carriers' Brief, p. 10).

> "By the order of cancellation the carriers were left entirely free to publish new rates, and those new rates could conceivably have been higher than, the same as, or lower than, the rates ordered cancelled." (Carriers' Supplemental Brief, p. 8.)

At this point we pause in the argument to note that the ensuing analysis proceeds on the assumption that as of the September 13 effective date, the Commission order would have caused cancellation of the tariffs in question absent the temporary restraining order, either because of its self-

executing nature or because of carrier compliance. The possibility that the carriers could have wilfully failed to comply with the order, and thereby blocked its effectiveness without becoming liable for refunds would make impotent the whole congressional scheme for review and consideration of tariffs.

The Commission's order of cancellation was served March 16, 1965, to become final April 14, 1965. Subsequently, the compliance date of the order was extended to September 13, 1965. Throughout this period, the carriers were free to publish new tariffs with ample time for the thirty days notice requirement to be met. Whether those new tariffs could have been higher than, the same as, or lower than, the schedules ordered canceled is immaterial, for the fact of the matter is that they did not publish any new traiffs. (The record makes clear that at least one reason for failing to publish new tariffs which would have been higher was the carriers' fear that the Commission would suspend them. This is also a fair indication that the carriers recognized the actual import of the cancellation order.) When the compliance date of September 13 arrived, the carriers had not published any new tariffs and the increased tariffs were to be canceled. If their argument that cancellation would leave them with no rates whatsoever which could be charged is correct, we could only conclude that as of that date they were bound to quit offering services to the public at all because of their dereliction in failing to publish new tariffs. But since even the shippers do not suggest such a harsh result, and since it seems rather contrary to common sense, we conclude only that the pre-existing lower rates should have come into effect at that time, either by operation of law or by the affirmative action of the carriers.

In concluding that, in the absence of any carrier action to establish new rates where a tariff is found unlawful, the last lawful pre-existing rates are the effective rates to be applied by a court in considering restitution, we find an

analogy in the case of Chicago, M., St. P. & P. R. Co. v. Alouette Peat Products, Ltd., 253 F.2d 449 (9th Cir. 1957). In that case, the carriers published increased rates which the court found to be unlawful because they failed to comply with the statutory 30-day notice requirement. The court acknowledged that the carriers were entitled to collect this rate because it was the only published rate on file, but ordered restitution to the shippers to the extent that this rate exceeded the immediately preceding one, because the higher rate had not been lawfully established.

> "No change having been legally made in the rate which existed before Ex Parte 162 [the one published on less than statutory notice], that rate was the only existing, legally established rate and the Court was bound to apply it." 253 F.2d at 456.

To summarize our holding on this aspect of the case, we conclude that the Commission order canceling the tariffs in issue rendered those tariffs unlawful as of the effective date of the order, with the consequence that the immediate prior lower rates should have been in effect and would have been in effect had not the temporary restraining order been issued.

IV. Restitution as a Remedy for Losses Suffered by Virtue of an Injunction

[9] The issuance of an injunction will in many cases cause financial losses to interested parties as well as prevent irreparable injury to the procurers. More importantly in cases such as this, where the restraint is directed against an order of an administrative agency charged with regulating rates to be charged to the public at large, the injunction may cause substantial losses to the general public which can never be adequately compensated. In such cases, it is the duty of the court issuing the injunction to take necessary measures to protect the interests of parties before it, as well as the public interest. (This was done in

this case by the issuing judge prudently requiring a substantial bond before issuing the temporary restraining order. The temporary restraining order is customarily issued, and usually ex parte, to maintain the status quo pending a detailed review on the merits.)

For some time, it was thought to be the law in the federal courts that the only remedies available to parties injured by the issuance of an injunction were an action for damages on the injunction bond, if one had been required, in which case the amount recoverable was limited to the amount of the bond, or, in the absence of a bond, an action for malicious prosecution where applicable. Russell v. Farley, 105 U.S. 433, 26 L.Ed. 1060 (1881). The substantial limitations inherent in these remedies are readily apparent.

But in 1919, the Supreme Court significantly expanded the protection to be accorded injured parties by allowing recovery in the nature of restitution in cases where that remedy might be appropriate. Arkadelphia Milling Company v. St. Louis S. W. Ry. Co., 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517 (1919). The principles enunciated in *Arkadelphia* are central to the resolution of this case, and hence it will be examined in detail. The state of Arkansas, through an administrative agency, established rates to be charged by railroads for intrastate transportation of freight and passengers. The railroads brought suit in federal court, attacking the rates on the grounds that they were confiscatory. The district court issued an injunction, conditioned on a bond, restraining enforcement of the rates and ultimately issued a permanent injunction on the grounds that the rates were confiscatory. Upon entering the final decree, the bonds were dissolved. This decision was appealed, and the Supreme Court reversed the decree, holding that while the complaining railroads were justified in criticizing many of the tests applied by the State in determining the rates, they had failed to sustain their burden

of proof that the rates were confiscatory. The complaint was ordered dismissed without prejudice, Allen v. St. Louis, I. M. & S. Ry. Co., 230 U.S. 553, 33 S.Ct. 1030, 57 L.Ed. 1625 (1912). On remand, the district court entered a decree in conformity with the mandate and referred the case to a master to determine the award of damages. The master awarded damages, measured by the excess rates charged by the railroads over those prescribed by the state commission, against the railroads and the sureties on the bonds for the period from the issuance of the injunction to the entry of the original decree and also for the period between the entry of the original decree and the entry of the final decree conforming with the mandate. The district court affirmed the master's report and awarded judgment accordingly. On appeal to the Supreme Court, this judgment was affirmed with the modification that the sureties were not liable for the period following the final decrees since the bonds had been dissolved at that time.

The railroads in *Arkadelphia* made three arguments which are pertinent to the instant case. First, they argued that the higher charges in force prior to the issuance of the permanent injunction were lawful charges by virtue of the temporary injunction; that the decision reversing the issuance of the permanent injunction operated prospectively only and did not determine that the temporary injunction was wrongfully issued; and that the condition of the bonds required a final decision on this issue in order to establish liability to the shippers. The Supreme Court disposed of this contention as follows:

> "But this is to construe the bonds according to the letter and not according to the substance. The state statute and the orders of the Railroad Commission entitled shippers to the benefit of the rates thereby established; and they were thus entitled at all times except as it became necessary to stay the operation of the rates by equitable process in order to permit of a judicial inves-

tigation into the question of their adequacy. The burden of proof to show them inadequate was upon the railway companies; and when they failed to sustain this burden they at the same time showed that the injunctions ought not to have been allowed." Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co., 249 U.S. 134 at 144, 39 S.Ct. 237 at 2411 (1919).

Secondly, the railroads argued that as to damages occurring after the issuance of the permanent injunction, the reference to the master was only for the purpose of determining damages on the bonds, which liability was discharged with the issuance of the permanent injunction, and that the permanent injunction itself created no liability on the part of the railroads to the shippers. This argument led to the Court's significant holding that these damages were recoverable on the theory of restitution. This holding was based on the "principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *Id.* at 145, 39 S.Ct. at 242. (*See* American Law Institute, Restatement of Restitution, § 74 (1937)).

Finally, the railroads argued that since the reversal of the district court's decree was "without prejudice," the rights of the parties were left in doubt and thus there was no basis for the award of damages. The Court held that:

> " * * * [T]he rights of the present shippers were so clear as to make an allowance of damages upon the injunction bonds and restitution upon the reversal of the decrees manifestly their due. That the reversal was 'without prejudice' did not deprive the decrees of conclusiveness as to past transactions, but only prevented them from being a bar to future suits for injunction upon a showing of changed conditions." *Id.* at 147, 39 S.Ct. at 242.

[10] The carriers in the instant case seek to distinguish *Arkadelphia* on the following grounds. First, they argue that the jurisdictional bases for judicial review and restraint of the orders are different; in *Arkadelphia,* the jurisdiction of the court was founded on the denial of a constitutional right (confiscation of property in violation of due process), whereas here the right of review is accorded by statute (28 U.S.C.A. §§ 2284, 2324, 2325). We fail to perceive how this distinction makes a difference. In either case, the jurisdiction to issue the injunction is founded on traditional equity powers, and concomitant with the power to issue the injunction is the power to restore the parties to their rightful positions if the injunction is wrongfully issued. Surely it could not be contended that because Congress required that injunctions restraining orders of the Interstate Commerce Commission be issued by a three-judge court, instead of a single judge, it thereby expanded or contracted rights of the parties affected by that injunction. Secondly, the carriers argue that the lower rate was legislatively prescribed in *Arkadelphia,* whereas in this case there was no lower rate prescribed. We have disposed of this contention above. Finally, they contend that restitution was proper in *Arkadelphia* because there was no other remedy available in that case, while here § 304a of the Interstate Commerce Act provides another remedy. We will deal with this contention below in connection with other defenses suggested by the carriers.

Following the decision in *Arkadelphia,* the Supreme Court applied its principles in numerous cases. In a case involving municipal regulation of gas utility rates, where a district court's temporary injunction enjoining enforcement of the rates followed by a denial of a permanent injunction was affirmed as modified by the Supreme Court, it was held in a subsequent decision that the district court had jurisdiction to order refunds, through a special master, of the excess rates collected by the gas company by virtue of the temporary injunction, and indeed that retention of

such jurisdiction was required by the principle of *Arkadelphia*. Ex parte Lincoln Gas & Electric Light Co., 256 U.S. 512, 41 S.Ct. 558, 65 L.Ed. 1066 (1921).

Of particular interest with respect to the instant case is a contention made by the gas company regarding the extent of the period for which restitution should be required. The district court entered its first decree upholding the validity of the rate ordinance on September 23, 1915, and dismissed the bill finally. The temporary injunction was continued, however, on a supersedeas bond to permit appeal by the gas company. On that appeal, the Supreme Court affirmed the district court's dismissal of the bill on the grounds that the rates were not proved to have been confiscatory during the period then involved, approximately 1908 to 1915. However, the Court took judicial notice that labor costs and returns on capital had increased substantially since the end of World War I and modified the dismissal to provide that it would be without prejudice to the institution of a new suit proving confiscation subsequent to the date of the final decree, September 23, 1915. Lincoln Gas & Electric Light Co. v. Lincoln, 250 U.S. 256, 39 S. Ct. 454, 63 L.Ed. 968 (1919).

On remand, the district court ordered restitution for the period of the temporary injunction up to the date of the final decree, and also for the period following the final decree while the injunction was in effect pending the appeal. Appealing this order, the company contended that there was no liability for excess charges after the date of the final decree, because by virtue of the Supreme Court's prior modification order, the validity of the ordinance was finally determined only up to the date of the final decree; since the bill was dismissed without prejudice to a new suit subsequent to that date there was no final adjudication of the validity of the ordinance rates subsequent to that date. But the Supreme Court held that restitution was proper for this period also, because the ordinance rate was presumptively valid and binding until the company

successfully concluded a suit showing that it was non-compensatory. Ex parte Lincoln Gas & Electric Light Co., 256 U.S. at 518, 41 S.Ct. 558.

Remedies available to parties who might be injured by the issuance of an injunction restraining an agency order were further expanded by the decision of the Supreme Court in Inland Steel Co. v. United States, 306 U.S. 153, 59 S.Ct. 415, 83 L.Ed. 557 (1939). In that case, the Interstate Commerce Commission found that certain allowances granted shippers by railroads were discriminatory and unlawful and ordered them canceled. The shippers sought an injunction restraining this order. The district court granted the injunction, but conditioned it on the payment of the contested allowances into a special account, subject to the order of the court, although neither the ICC nor the railroads requested such a condition. The Supreme Court held that the imposition of the condition was within the equity powers of the court in order to protect restitutional rights, relying on *Arkadelphia* and *Ex parte Lincoln Gas.* Upon affirmance of the commission's order, the special account was ordered restored to the railroad.

Finally, in reviewing Supreme Court cases on this issue of restitution, we may note that the Court has emphasized the importance of protecting the interests of parties adversely affected by the issuance of injunctions against administrative orders by reversing decisions which failed to award restitution or damages where it was clearly due *See* Baltimore & Ohio R. R. Co. v. United States, 279 U.S. 781, 49 S.Ct. 492, 73 L.Ed. 954 (1929); Public Service Commission of Missouri v. Brashear Freight Lines, Inc., 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083 (1941).

The principles enunciated in these Supreme Court decisions have been applied in numerous cases before the Courts of Appeals. Among those cases, we take specific note of two decided by our own Circuit. Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., 80 F.2d

32 (8th Cir.), cert. denied, 297 U.S. 715, 56 S.Ct. 591, 80 L.Ed. 1001 (1935), involved a receivership proceeding in which the railroad was placed in receivership and a special master was appointed to determine claims against it. Certain shippers appeared in the proceeding before the special master and filed claims for rate overcharges against the railroad and also sought a preference for those claims. The alleged overcharges occurred under the following circumstances. The state of Missouri established by legislative action a schedule of maximum freight rates. The railroads obtained an injunction against those rates and during the period of injunction charged higher rates than permitted by the statute. The Supreme Court of Missouri ultimately sustained the validity of the legislation and dissolved the injunction. Applying the principles discussed above, this Court allowed the claims for overcharges against the railroads in the receivership proceeding, although for reasons not here material the demand for a preference was not allowed. *Berthold-Jennings Lumber Co., supra* at 40.

[11] A somewhat different problem confronted this Court in the case of Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 154 F.2d 909 (8th Cir.), cert. denied, 329 U.S. 761, 67 S.Ct. 110, 91 L.Ed. 656 (1946). There the pipe line company had challenged an order of the FPC ordering reduced rates on the transportation and sale of natural gas. A stay order against the Commission was granted by the Court of Appeals in order to permit the company to obtain review, but the stay was conditioned on the payment into court of the excess charges pending final determination. The Commission order was ultimately upheld and the Court was then faced with the problem of distributing the impounded funds. The specific question involved in *Panhandle* was whether the expense of distribution should be borne by the pipe line company or whether it should come out of the impounded funds, in effect making the expense of distribution fall on the con-

sumers entitled to restitution. This Court held, relying in part on *Inland Steel, supra,* that the expense of distribution should fall on the company. This decision is consistent with the general principle that a party who obtains a benefit from an improperly issued injunction has the duty to restore that benefit to those who have been injured by the injunction.

Finally, attention may be given to the case of Accelerated Transport-Pony Express, Inc. v. United States, 227 F. Supp. 815 (D.Vt.), aff'd, 379 U.S. 4, 85 S.Ct. 43, 13 L.Ed.2d 21 (1964). In that case, carriers challenged an order of the ICC finding that the carriers' rates were not shown to be just and reasonable because certain charges for short hauls were higher than those for long hauls and ordering the tariffs canceled to the extent of this discrepancy. A temporary restraining order was obtained by the carriers, but on the final decision on the merits, a three-judge district court sustained the ICC's order and dismissed the complaint. The proceedings following this dismissal are not reported, but counsel has made available to this court the pertinent documents which indicate substantial relevance to this case. Following the dismissal, a single judge of that court ordered a reference to a master pursuant to the bond required on the temporary restraining order in order to determine damages sustained by shippers and receivers of freight because of the temporary restraining order. In conjunction with the reference, the court ordered the shippers to file an accounting of all monies collected by them in excess of rates or charges which would have been applicable had the ICC's order not been restrained.

In the course of the proceedings before the master, it became apparent that the shippers and the carriers were in substantial disagreement over the rate basis of the accounting, and also that the accounting itself would amount to a considerable expense on the part of the carriers. Consequently, a settlement agreement was entered into by which the carriers agreed to pay approximately $469,000

into a fund to be administered by a trustee; out of the fund the trustee was to pay litigation expenses of the prior suit and also to pay claims for over-charges proved by injured parties. The government assented to this settlement, and the district court approved the stipulated agreement and discharged the bonds accordingly.

The carriers in the instant case attack the relevance of *Accelerated Transport* as precedent. They contend that there was never any hearing on the primary issue of liability to make refunds, that there was never any decision that there was such liability, and that the stipulation itself does not confess such liability.

Underlying this argument is the suggestion that the only reason the settlement was entered into was that the carriers were under coercion because of the even more expensive task of making an accounting to the master. However, the conclusion is inescapable that the reference to the master and the stipulation that was accepted in satisfaction of the liabilities and rights entailed reflects that court's decision that the carriers had a duty to answer for the damages caused by the improvident issuance of the temporary restraining order. We reject the position that the stipulation was a product of coercion; if the carriers believed that the reference to the master was improper, that order was appealable by means of a writ of mandamus. *See* 5 Moore's Federal Practice ¶ 53.05 [3] (1969). *Accelerated Transport* is clearly entitled to precedential value on this issue.

V. The Carriers' Affirmative Defenses

Against the foregoing authority, the carriers make the following affirmative contentions, based primarily on their interpretation of Part II of the Interstate Commerce Act: (1) first, they argue that restitution to shippers is precluded under the Interstate Commerce Act as interpreted by the Supreme Court, relying on Atlantic Coast Line

R. R. Co. v. Florida, 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451 (1935); (2) secondly, they argue that § 304a of the Act provides an exclusive remedy of which the shippers have not availed themselves; (3) third, they argue that to order restitution in this case would contravene the express provisions of the Act that carriers may not make refunds to shippers from the published tariffs.

A. *Atlantic Coast Line R. R.* v. *Florida.*

In *Atlantic Coast Line, supra,* the Supreme Court denied restitution to shippers; the facts of the controversy are as follows. Rail carriers in Florida had voluntarily established certain intrastate rates, which were later approved as maximum rates by an order of the Florida State Commission. The Interstate Commerce Commission instituted an investigation in which it found that those rates were confiscatory and resulted in discrimination against interstate commerce. It prescribed a new schedule of rates higher than those set by Florida. Florida sought judicial review of the ICC order, and the Supreme Court set aside the order on the grounds that the Commission had not made adequate findings. Florida v. United States, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291 (1931). The Commission then held a new hearing, made new findings and prescribed its same higher rate schedule for substantially the same reasons as before. The Supreme Court affirmed this second order. Florida v. United States, 292 U.S. 1, 54 S.Ct. 603, 78 L.Ed. 1077 (1934). The State of Florida and other shippers meantime brought suit in the district court for restitution of the difference between the higher rates charged by the railroads and the approved state rates for the period between the issuance of the first invalid order of the ICC and the date of its ultimate reversal because of procedural defects in not supplying adequate findings justifying the order. The district court allowed partial restitution of these rates. The Supreme Court, in an opinion by Justice Cardozo, reversed, holding that the shippers

were not entitled to restitution on these facts. Atlantic Coast Line R. R. Co. v. Florida, 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451 (1935).

Justice Cardozo's opinion specifically recognized that the principle of restitution was applicable to the situation, but held that the equities of that situation favored permitting the carriers to retain the charges, "* * * restitution is without support in equity and conscience." *Id.* 312-313, 55 S.Ct. 718. Three reasons were advanced as to these equitable considerations. First of all, the carriers had collected the higher rates by virtue of their compliance with the ICC order. The court noted that the carriers were not free to refuse obedience to the order. Secondly, the factual basis for the ICC order setting higher rates—the discrimination against interstate commerce by the lower rates—existed in fact at the time of that first order; and this discrimination was declared unlawful by statute. The order was invalid for procedural reasons only (incomplete and inadequate findings), not because it was based on an improper determination of the facts. In other words, the factual justification for the higher rates was in existence at all times and had been specifically approved by the ICC. Thirdly, the lower rates which the shippers contended should be the measure of restitution were confiscatory. The Court observed: "A situation so unique is a summons to a court of equity to mould its plastic remedies in adaptation to the instant need." 295 U.S. at 316, 55 S.Ct. at 719. Furthermore, the Court was expressly motivated in allowing the carriers to retain the higher rates by considerations of the deference due to the expertise of the ICC and of accommodation of the judicial process to the administrative process. Thus, to affirm the retention of the higher rates would be consistent with the action of the ICC, whereas to order restitution, in addition to being inequitable, would be inconsistent with the ICC's action.

The facts of the instant case contrast sharply with those of *Atlantic Coast Line.* Here, the carriers have charged

higher rates, not in compliance with an ICC order, but in spite of that order and only by the use of judicial restraint subsequently held to have been improvidently granted. The ICC has ordered the increases in this case canceled, rather than ordering lower rates raised. In *Atlantic Coast Line*, the Commission found as a fact that the higher rates were justified, and this finding was ultimately sustained by the courts. Here the Commission found that the higher rates were not justified, and on the hearing for the interlocutory injunction, the court found that the carriers presented no evidence suggesting that this finding would likely be disturbed. The lower rates to which restitution was sought in *Atlantic Coast Line* were found by the Court to be confiscatory upon satisfactory proof presented by the carriers. Here the carriers contended both before the Commission and the district court that the lower rates would be confiscatory, but failed to carry their burden of proof in either forum. Finally, in *Atlantic Coast Line*, to order restitution would have been inconsistent with the administrative process, whereas here restitution is not only consistent, but as developed more fully below, denial of restitution would be inconsistent with the administrative process.

Implicit in the carriers' reliance upon *Atlantic Coast Line* is the assumption that that case held that under no circumstances could restitution be awarded to shippers. This assumption is without foundation either in the language of that opinion or in subsequent interpretations of that decision. Indeed, subsequent decisions of both the Supreme Court and other courts have read the case to authorize reference of certain issues to an appropriate administrative agency in order to aid courts in devising restitutional remedies for parties before them in cases involving those agencies, *even where the agency itself has no authority to award such restitution.* The authority for this position follows from Justice Cardozo's reliance on the first *invalid* ICC order finding the rates to be unjustly discriminatory.

The case most nearly analogous to the present situation is United States v. Morgan, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939). Involved in that case was an order of the Secretary of Agriculture under a statutory scheme of regulation of stockyards (7 U.S.C. §§ 181-229) similar to that of the Interstate Commerce Act regulating motor carriers. The stockyard owners were required to charge rates which were "just, reasonable, and non-discriminatory, and any unjust, unreasonable, or discriminatory rate of charge is prohibited and declared to be unlawful." *Cf.* 49 U.S.C. 316(d) (Motor Carriers). The rates were to be established by filing a schedule with the Secretary. The Secretary, upon complaint or on his own initiative, could investigate the schedules, and if he found that they violated the Act, could prescribe new ones for the future; but if the investigation was on his own initiative, he could not award reparations for the past rates. Acting on his own initiative, the Secretary set aside a schedule of rates and prescribed lower ones. Suit was commenced to enjoin the order, and the district court issued a temporary restraining order on the condition that the stockyard owners deposit the difference between the two rates in a fund in court. The Supreme Court held the Secretary's order invalid because the Secretary had failed to accord the stockyard owners the full hearing required by the Act, and the case was remanded for further proceedings. Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936); 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938). Thereupon, while new proceedings were pending before the Secretary, the district court ordered the impounded fund to be returned to the owners, on the grounds that the lower rates had been required by an invalid order. The Supreme Court reversed, relying in part on *Arkadelphia, Ex parte Lincoln Gas, Baltimore & Ohio R. Co.*, and *Inland Steel Co.*, all discussed above. Most significant for purpose of this discussion was its reliance on *Atlantic Coast Line.*

Two principles governed the Court's decision. First of all, judicial review of administrative action should be coordinated as nearly as possible with the agency action so as to attain the ends of the statute. Secondly, "in exerting its extraordinary powers [as a court of equity] to stay execution of a rate order," the court had the duty to protect both the litigants and the public. 307 U.S. at 191, 59 S.Ct. at 800. "[A] court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates, and equally so to direct it to the restitution of rates which it has taken into its own custody, once they are shown to have been unlawful." *Id.* at 194, 59 S.Ct. at 801. Of course, as the Supreme Court itself subsequently noted, the fact that in fashioning its remedy the district court had ordered payment of the fund into court is immaterial to the basic underlying principles. *See* Addison v. Holly Hill Co., 322 U.S. 607, 621, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944). Although the Secretary himself could not order restitution, *Atlantic Coast Line* was read as authority for him to make a suitable order which would justify the court in awarding restitution to the customers of the stockyards. 307 U.S. at 192 et seq., 59 S.Ct. 795.

It would unduly prolong this already extensive opinion to discuss in detail all the other cases dealing with *Atlantic Coast Line.* It will be sufficient to point out that none of them has interpreted that case to preclude restitution in a case where it is clearly warranted under facts similar to the instant situation. *See, e. g.,* Federal Power Commission v. Interstate Natural Gas Co., 336 U.S. 577, 583, 69 S.Ct. 775, 93 L.Ed. 895 (1949); Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., 80 F.2d 32, 40 (8th Cir. 1935); Williams v. Washington Area Metropolitan Transit Commission, 134 U.S.App.D.C. 342, 415 F.2d 922, 942-944 (1968), cert. denied, D. C. Transit System v. Williams, 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 733 (1969); Bell v. United States, 49 F.Supp. 505 (E.D.La.-1943).

B. *T.I.M.E. Inc.* v. *United States and § 304a*

We turn now to the contention that restitution is precluded in this case because an exclusive remedy is provided by 49 U.S.C. § 304a. This section of the Act was passed in 1965 in response to the Supreme Court's decision in T.I.M.E., Inc. v. United States, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959), upon which the carriers also rely as precluding restitution. In order to understand fully this contention, it is necessary to examine the legislative history of Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301 et seq.

As originally passed in 1887, the Interstate Commerce Act established the Interstate Commerce Commission to regulate rail transportation. That statute is now Part I of the Act, 49 U.S.C. §§ 1-300. In 1935, the powers of the Commission were significantly expanded to encompass the regulation of motor carriers by the passage of the Motor Carrier Act, now Part II of the Interstate Commerce Act. In many ways, the two sections of the Act were parallel, but in other ways significant to the instant problem they were substantially different. Rights and remedies of common carriers and their customers had been the subject of a considerable body of common law devised by the courts. One of the problems faced by the Congress was how to reconcile this common law doctrine with the new statutory regulatory scheme. Part I of the Act contained several sections providing for both judicial and administrative remedies for persons damaged by failure of the railroads to comply with the Act. 49 U.S.C. §§ 8, 9, 13(1), 16. In contrast, Part II provided only a remedy for overcharges by a motor carrier, overcharges being charges in excess of the filed rates. 49 U.S.C. § 304a. Both sections of the Act also contained savings clauses relating to common law remedies which differed considerably. 49 U.S.C. § 22, relating to rail carriers provides that "nothing in this chapter contained shall in any way abridge or alter the remedies

now existing at common law or by statute, but the provisions of this act are in addition to such remedies." On the other hand, the savings clause relating to motor carriers, 49 U.S.C. § 316(j), is more restrictive: "nothing in this section shall be held to extinguish any remedy or right not inconsistent herewith."

[12, 13] For purposes of this discussion, the remedies with which we are most concerned are those for overcharges, reparations, and restitution. The differences between the three are significant. As noted above, overcharges are charges made by carriers in excess of the published tariffs, and both parts of the Act provided specific remedies for these. Tariffs under both sections of the Act are required to be just and reasonable. Reparation is a remedy for damages to the extent that the filed rates exceed a just and reasonable rate. Since primary jurisdiction to determine a just and reasonable rate rests with the Interstate Commerce Commission, any proceeding involving reparations, whether administrative or judicial, requires a finding of that Commission as to what a specific just and reasonable rate is. Under the remedial sections of Part I cited above, reparations may be recovered from rail carriers through either administrative or judicial proceedings. If the judicial avenue is chosen, a suit is filed in the district court, then there is a reference to the ICC for a determination of the just and reasonable rate, after which the suit is decided in accordance with this determination. No comparable provisions for reparations were originally included in the motor carrier part of the Act, but for some time it was assumed that the savings clause of § 316(j) allowed a comparable judicial proceeding with respect to motor carriers. *See* 2 U.S.Code, Cong. & Adm. News, pp. 2936-2941 (1965). The *T.I.M.E.* case held that such a remedy was not preserved by the savings clause. This decision was countered by legislative action in 1965 when Congress amended the Act to provide a reparation remedy by judicial proceedings in § 304a(2).

We turn now to an analysis of T.I.M.E., Inc. v. United States, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959), and its effect on the survival of a restitutional remedy. Interpretation of the *T.I.M.E.* decision is not without difficulty; it was a 5 to 4 decision and both the majority and minority relied on the same case in reaching their conclusions—Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). Further difficulties are encountered by the gloss put upon the *T.I.M.E.* decision in the case of Hewitt-Robins, Inc. v. Eastern Freight-ways, Inc., 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142 (1962), and Pensick & Gordon, Inc. v. California Motor Express, 371 U.S. 184, 83 S.Ct. 264, 9 L.Ed. 2d 227 (1962). Mr. Justice Harlan, the author of the *T.I.M.E.* decision dissented with two other justices, in the latter two cases.

The Texas & Pacific R. Co. v. Abilene Cotton Oil Co. case involved a state court proceeding in which the state court determined that certain railroad rates, charged in accordance with tariffs filed with the ICC, were unreasonable and awarded reparations to shippers. The Supreme Court reversed holding that the state court had no jurisdiction to determine the reasonableness of rates, since that was within the primary jurisdiction of the ICC. As pointed out by Mr. Justice Black in the *T.I.M.E.* dissent, following the *Abilene* decision, reparations proceedings were often brought in courts which referred the issue of reasonableness to the ICC and then decided the suit in accordance with the ICC finding. Nevertheless, the majority in *T.I.M.E.* read *Abilene* to hold that courts may not adjudicate issues which are within the primary jurisdiction of the ICC. (*See* Mr. Justice Harlan's dissent in *Hewitt-Robins,* 371 U.S. at 90, 83 S.Ct. 157. As to the availability of the reference procedure with respect to motor carriers, *T.I.M.E.* held that this could not be utilized because it would permit the ICC to accomplish indirectly what Congress had not given it the authority to accomplish directly.

Although not specifically discussed by the majority, apparently the reference procedure in rail carrier cases is justified because the ICC has direct reparation authority. Also, the court pointed out that shippers had some protection in the motor carriers' rate-making process, because rates could be changed only on thirty days notice, shippers could protest the change and be heard in the subsequent administrative proceeding, and the ICC had authority to suspend the changes for up to seven months, by which time ordinarily a final determination would have been made.

Lower courts initially interpreted *T.I.M.E.* to mean that no common law remedies survived in motor carrier cases where primary jurisdiction rested with the ICC. Pensick & Gordon, Inc. v. California Motor Express, Ltd., 302 F.2d 391 (9th Cir. 1962); Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 293 F.2d 205 (2nd Cir. 1961). But this notion was dispelled by subsequent Supreme Court decisions. In the review of the *Hewitt-Robins* case, 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142 (1962), involving a misrouting practice, the Court held that survival of a remedy against a carrier, even if the practice was within the primary jurisdiction of the ICC, depended solely on whether the remedy was consistent or inconsistent with the Act. *T.I.M.E.* was explained on the grounds that to allow reparations would interfere with the stability of the rate structure. No specific test of consistency was suggested, but the Court was influenced primarily by the following factors:

> "Unlike rate making there is no statutory procedure by which routing practices may be challenged in advance of shipment. * * *
>
> "* * * [T]he allowance here of a damage action nowise hampers the efficient administration of the Act, unlike the allowance of such an action as to unreasonable rates.* * * Moreover, the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which in turn would minimize 'cease and

> desist' proceedings before the Commission. Finally, and not to be overlooked, the absence of any judicial remedy places the shipper entirely at the mercy of the carrier, contrary to the overriding purpose of the Act. The allowance of such actions would, on the contrary, give neither an unfair advantage." 371 U.S. at 87-88, 83 S.Ct. at 159.

The result in *Hewitt-Robins* was to allow survival of a remedy for misrouting practices. The *Pensick & Gordon* case, *supra,* was vacated and remanded for reconsideration in light of *Hewitt-Robins,* 371 U.S. 184, 83 S.Ct. 157, 9 L.Ed.2d 142 (1962), and on reconsideration the Ninth Circuit allowed survival of a remedy against a motor carrier for refusal to render service. Pensick & Gordon, Inc. v. California Motor Express, 323 F.2d 769 (9th Cir. 1963), cert. denied, 375 U.S. 984, 84 S.Ct. 517, 11 L.Ed.2d 472 (1964). These cases do not dispose of the instant case, because we do have involved here a rate-making proceeding. But since the remedy at issue, restitution, is not the same as that involved in *T.I.M.E.,* reparations, we must determine whether that remedy survives under § 316(j), in light of the criteria to be distilled from *T.I.M.E.* and *Hewitt-Robins.*

[14] According to our reading of these two cases, the following criteria determine the survival of a remedy: (1) Does application of the remedy involve adjudication of an issue within the primary jurisdiction of the Interstate Commerce Commission? (2) Does the remedy enable the Commission to accomplish indirectly what it cannot accomplish directly? (3) Does the remedy interfere with the stability of the rate structure? (4) Does the remedy otherwise hamper the efficient adminstration of the Act? We conclude that under none of these criteria is restitution precluded.

[15] The key problem with respect to the first criterion is "adjudication." In a suit for reparation because of an

unreasonable rate or one for damages because of unreasonable routing practices or for refusal to render services, the basic issue is obviously one within the primary jurisdiction of the Commission. But in awarding restitution under the facts of this case—i.e. for the period of the temporary restraining order—it is difficult to see that the court is adjudicating anything involving the primary jurisdiction of the Commission. We are of course determining the effect of a Commission order, but that does not involve a factual determination which brings the primary jurisdiction doctrine into play. Insofar as we decide that a proper construction of the Commission's order requires restitution, we are deciding a question of law to which the Commission's expertise does not reach. *See* 3 Davis, Administrative Law Treatise § 19.02 at p. 8 (1958). Furthermore, the primary jurisdiction problem ordinarily arises only when a court is requested to act initially on a problem; but here we are proceeding on review of an order where the Commission has already acted. 3 Davis, Administrative Law Treatise § 19.01. Thus it does not appear that this remedy is barred because of the primary jurisdiction of the ICC.

As to the second criterion, allowance of restitution would not permit the Commission to accomplish indirectly what it cannot accomplish directly. As we view the situation, to allow restitution merely gives effect to the Commission's order of cancellation, and clearly this order was within its power.

Whether allowing restitution would interfere with the stability of the rate structure is a somewhat more difficult problem. It is not at all clear what "interference" the Supreme Court saw in the reparation remedy in the *T.I.M.E.* case, especially since it was exactly that remedy which was restored to the statute in the Congressional amendment to § 304a. In any event, since the carriers concede that the remedy under § 304a could be pursued in this case, there would seem to be no more interference in al-

lowing restitution. The stability of the ratemaking process which the court referred to in *T.I.M.E.* involved the process of filing rates, publishing, giving notice, an opportunity for protest, holding hearings and issuing a final order. Here that whole process has been completed. Where either party then seeks review of that process, and particularly where a stay of the Commission order is granted, there is necessarily a certain amount of interference. The problem which the court faces then is to determine how that interference can be kept to a minimum. The solution to the problem is to accord sufficient remedies to both parties to insure protection upon the ultimate resolution of the agency action. Thus, in appropriate cases, the correlative remedy to the temporary restraining order is a bond and restitution.

The final criterion to be investigated is whether allowance of the remedy interferes with the efficient administration of the Act. Since the carriers admit that the § 304a remedy is available, the real question here is whether remitting the shippers to that remedy is preferable to allowing restitution. We see numerous reasons for preferring restitution under the circumstances of this case.

First of all, permitting restitution will avoid a multiplicity of suits in a case such as this where it is ancillary to a suit instituted by the carriers. Many, if not most, of the issues to be decided in the carriers' review proceeding would be determinative of the issues involved in a subsequent proceeding for either "reparations" or restitution —e.g., the validity of the Commission's order, the validity of the rates, the amount of the recovery. To remit the shippers to the § 304a remedy would require the filing of a new lawsuit, a reference to the Commission, and subsequent judicial proceedings on the Commission's findings.

Secondly, to require this procedure in a case such as this would require double litigation before the Commission of the same rates—once in the challenge to the tariff and

again in the reparation proceeding. This seems to us to be an unwarranted burden on the Commission's resources. The apparent purpose of the reparation remedy was to allow shippers to recover damages from rates which had been filed with the Commission, but which were for some reason unlawful and which had not been subject to the ordinary processes of agency review. Where those rates have gone through the proper agency channels, and where the Commission has finally acted, it would seem more efficient to allow any proper judicial remedies upon subsequent judicial review of that action.

Thirdly, to require the reparation remedy would result in depriving the shippers of just those protections in the ratemaking process which the Supreme Court found so important in the *T.I.M.E.* case. Here the shippers have successfully challenged the carriers' rates in the administrative proceeding. In the course of that proceeding, they had to pay the higher rates which were ultimately ordered canceled for over 18 months. The carriers failed to comply with the Commission's order. To hold that the shippers have no remedy for this failure of compliance, except to litigate the whole issue all over again, would make a mockery of the statutory process for challenging carrier-made rates.

Finally, allowing restitution in this case would have the advantage of protecting not only the instant parties to the litigation, but also to some extent the general public. It is reasonably certain that many members of the general shipping public, who ultimately bore the burden of the higher rates in force by virtue of the temporary restraining order, will be unable for practical reasons to recover these charges. To the extent that allowing restitution in cases where the carrier fails to successfully prosecute his challenge to the administrative order will deter challenges of doubtful merit, the purposes of the Act in protecting the general public will be served.

[16] We conclude that the principles of *T.I.M.E.* do not preclude restitution on this case, nor is §304a an exclusive remedy.

C. *The policy of the Act disallowing refunds.*

We turn now to the carriers' contention that allowing restitution would contravene the policy of the Act prohibiting carriers from making refunds from published tariffs and that the only published tariffs are the ones from which the shippers seek restitution. This argument derives from 49 U.S.C. § 317(b) which provides: "No common carrier by motor vehicle * * * shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares or charges so specified * * * in its tariffs. * * *" Violation of this provision subjects the carrier to criminal sanctions under § 322(a). In order to make this section applicable, the carriers must adopt the position, as indeed they do, that under no circumstances can a refund from published tariffs be awarded, even where the Commission has specifically ordered cancellation of existing rates and the carrier has failed to comply with this order. Alternatively, it is implied in several instances in the carriers' brief that the lower court's action validated collection of the published tariffs. Either position is manifestly untenable.

In their brief, the carriers argue the first position as follows:

> "* * * [T]he only lawful rates which may be collected by the carriers are those in duly published tariff schedules. * * * The schedules can be changed only upon *publication of new schedules* by the carriers. This is true even when the Commission orders a rate canceled. * * * Carrier compliance, not the Commission order, makes the new rate effective" (Carriers' Br.. p. 24.)

* * * * * * * * *

> "It is clear, as all here must agree, that the carrier initiates the rate, that the Commission may order the rate cancelled, but that such cancellation becomes effective, not by Commission order, but by carrier compliance with the Commission order. Failure of compliance is punishable, but does not render the rate unlawful." (Carriers' Br., p. 45.)

Before discussing the law on this issue, we take note of certain practical implications of the carriers' position. The proposition that a carrier may wilfully ignore an order of the Commission and collect charges under a tariff that the Commission has ordered canceled without any liability to shippers is on its face highly questionable. As Justice Cardozo noted in the *Atlantic Coast Line* case, *supra*:

> "The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court. It would have exposed itself to suits and penalties, both criminal *and civil*, if it had followed such a path. * * * Obedience was owing while the order was in force." 295 U.S. at 311, 55 S.Ct. at 717. (emphasis added.)

Furthermore, this proposition is totally inconsistent with the carriers' actions and contentions in all the proceedings prior to this appeal. Lest there be any misunderstanding, we emphasize here that we are not implying any "estoppel" of the carriers to assert this proposition in this court, simply because of their prior position. But where a contention is prima facie doubtful, and where all parties to a proceeding, including the one now standing on the contention, have acted exactly opposite to the position now taken, that is strong evidence of what the legal situation is in fact. The record before us shows quite clearly that the carriers, the shippers, the Commission, the district judge who granted the temporary restraining order, and the Three-Judge Court which denied the temporary injunc-

tion all operated on the assumption that unless there was a stay of the Commission's order, the carriers would be unable to charge the rates in the tariff which was ordered canceled. The evidence in the record to this effect is voluminous, of which the following samples are indicative.

First of all, we note the repeated attempts, some of which were successful, of the carriers to obtain postponement of the Commission's order. If the carriers were free to ignore the Commission's order, there would seem to be no urgency in getting these postponements. Secondly, the motion for the temporary restraining order, filed concurrently with the complaint to set aside the Commission order, specifically alleged that if the order became effective they would suffer substantial loss of revenue and be required to offer transportation services for non-compensatory rates. Obviously, this could not occur if they could continue to charge the existing tariffs. The district judge, in granting the temporary restraining order, expressly found that "unless enforcement [of the order] * * * is restrained by this Court, and the effective date thereof suspended, immediate and irreparable injury, loss and damage will result to [carriers]. * * *" Again, there could be no such injury if the carriers could ignore the order without having to make refunds.

In the judicial proceedings below, the carriers consistently maintained the position that unless they were awarded temporary relief, the Commission order was self-executing and they would suffer a loss of revenue. The following excerpts from the hearing to extend the temporary restraining order are indicative of the argument of carriers' counsel:

> "We are talking about a tariff that * * * but for the temporary relief and very urgent relief obtained from this Court, would have been cancelled as of Monday of this week.
>
> * * * * * * * * * *

> "Once this order becomes effective, this matter, this application [for review of the Commission order] is at an end. The order is self-executing. * * *
>
> * * * * * * * * * *
>
> "[I]t is a perfectly lawful charge that has been made, and it continues lawful *until* for one reason or another *the effective date* of the Commission's order comes about." (emphasis added.)

In granting the extension of the temporary restraining order, with the protection of a $300,000 bond, the district judge again did so on the specific finding that unless the order were restrained the carriers would suffer an immediate loss of revenue.

In the hearing before the Three-Judge District Court on the granting of the interlocutory injunction, the carriers again took the position that unless the relief were granted, the order was self-executing and they would not be able to charge the rates prescribed in the tariff. After spending some time arguing the merits of the Commission's order, carriers' counsel was urged by the Court to get to the immediate issue of the necessity for the preliminary injunction. He did so as follows:

> "Mr. Evarts: The last sentence of the order says that on one day's notice the carrier shall publish new rates, and these proceedings shall be discontinued. There is nothing left. We have nothing to review because the Commission order has in effect executed itself. * * * [A]nd so the only way that we can get a review is to stay the effect of the Commission's order so that this Court can determine whether or not we were in fact denied a fair hearing by the Commission and if the Commission acted improperly. We have no other remedy. We have exhausted administrative remedy and without this order staying in effect we

are denied judicial review which Congress says we have a right to. * * *

"Judge Blackmun: I take it, Mr. Evarts, your mootness argument is that if the temporary injunction is denied, then the Commission's order is self-executing * * *.

"Mr. Evarts: That is one result that would follow."

In denying the interlocutory injunction, the Three-Judge Court did so in part on the grounds that staying the Commission's order would cause considerable loss and injury to the general public. There could have been no such finding were it not the consensus of all the participants that the effect of the Commission's order was to prevent the carriers from charging the higher rates.

[17] Were we to uphold the carriers' contention that no restitution is possible from these tariffs because they had not published any others, that holding would itself be a conclusive argument against the granting of any temporary restraining order against a Commission order like the one in this case. For if the carriers are free to charge the rates in a tariff ordered canceled, without any liability to shippers resulting, then there can be no showing of irreparable injury which is a necessary prerequisite to the granting of a temporary restraining order under 28 U.S.C. § 2284. According to the provisions of this section a temporary restraining order may not be issued against the Commission, unless the district court makes "a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted." To the carriers' suggestion that the temporary restraining order is necessary in order to obtain an "orderly review" (apparently in the absence of irreparable damage), this section provides a complete answer. It is not necessary. Equally explicit is 28 U.S.C. § 2324, which provides that the pendency of an

action to review a Commission order shall not of itself operate as a stay of that order. It is abundantly clear that "orderly review" can be obtained without a stay of the Commission's order. A stay is justified only if there is irreparable damage, and there is no such damage in the instant case if the carrier may charge rates which have been ordered canceled without liability.

[18] The case law on this issue reveals the fallacy of the carriers' argument. A rate which is filed with the Commission is not *ipso facto* a lawful rate. It is the *applicable* rate which the carrier must, under the compulsion of § 317 (b), charge to shippers in the regular course of business. The reason for the requirement is plain. Requiring payment of rates according to published tariffs without question reduces the possibilty that carriers will prefer some shippers over others, keeps interstate traffic flowing speedily without interruptions for on-the-spot disputes over rates, and encourages the channelling of those rate disputes that do arise to the Commission and the courts for adjudication. But merely because the carrier is bound to charge the filed rate, it does not follow that he is necessarily entitled to keep it.

[19] This distinction was made abundantly clear by the Supreme Court in the case of Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 (1932):

> "In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates; that is, those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-

> law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under section 6, the shipper was bound to pay the legal rate; but, if he could show that it was unreasonable, he might recover reparation." 284 U.S. at 384, 52 S.Ct. at 184. (footnotes omitted.)

Even where the Interstate Commerce Commission has conducted a full review of a filed rate, and refused to find it unlawful, it is not thereby converted into a lawful rate:

> "The finding of the Commission that the proposed schedules "are not shown to be * * * unlawful'. * * * has been held by the Commission not to constitute an approval or a prescription of the rates. * * * [T]hey stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations." Interstate Commerce Commission v. Inland Waterways Corp., 319 U.S. 671, 686-687, 63 S.Ct. 1296, 1305, 87 L.Ed. 1655 (1943) (footnote omitted).

Reparations proceedings inevitably involve a refund from published tariffs, regardless of any provisions in the Act preventing the carrier from making such refunds personally. *Cf.* National Motor Freight Traffic Assoc. v. United States, 268 F.Supp. 90 (D.C.1967), aff'd, 393 U.S. 18, 89 S.Ct. 49, 21 L.Ed.2d 19 (1968).

[20] Just as published tariffs are not a bar to a refund by means of reparations proceedings if they are not lawful, so the published tariffs are not a bar to an appropriate judicial remedy if for some reason they are not lawful. Several cases illustrate this principle. Thus in Inland Steel Co. v. United States, 306 U.S. 153, 59 S.Ct. 415, 83 L.Ed. 557 (1939), shippers claimed advantage of a tariff

which had been ordered set aside by the ICC, but which had remained in effect by virtue of a court order. The shippers contended that the statutory requirement that published tariffs be observed entitled them to the lower rates, even though those rates were in contravention of a Commission order. The Supreme Court answered this contention:

> "[T]he published tariff had contained the unlawful allowance solely because of the Court's injunction. To sustain the contention of appellant that the provision for allowances in the published tariff limited the authority of the court to prevent their payment would be to clothe a published tariff, in existence solely by reason of equitable intervention, with an immunity from equity itself. The Interstate Commerce Act grants no such immunity. *Cf.* Merchants Warehouse Co. v. United States, 283 U.S. 501, 511, 51 S.Ct. 505, 75 L.Ed. 1227." 306 U.S. at 159, 59 S.Ct. at 419.

Similarly, in Chicago, M., St. P. & P. R. Co. v. Alouette Peat Products, Ltd., 253 F.2d 449 (9th Cir. 1957), the court ordered the Commission to award to shippers the difference between a tariff which had not been published on the statutory 30-day notice, and the immediately prior published tariff, even though the Commission had refused to award reparations on the finding that the rates were not unjust or unreasonable. There the Commission had authorized the carriers to publish specified increased rates on five days notice. The carriers published rates higher than those authorized. When the shippers protested, the Commission found that the higher rates were justified and refused to order reparations. The Ninth Circuit expressly recognized that the new tariffs were the applicable ones which the carrier was bound to collect. But it also held that the carrier was not entitled to keep them where it had not complied with the ICC order. So here the carriers were entitled to collect the higher rates, but were not entitled to keep them when they have not complied with the ICC order.

Finally, the *Accelerated Transport case,* 227 F.Supp. 815, discussed above, recognizes the same principle. There the carriers charged rates in tariffs ordered canceled by the Commission while those tariffs were in effect during the period of the temporary restraining order. Following affirmance of the Commission's order and dissolution of the temporary restraining order, the Court ordered a refund (implemented as described in the discussion above) from the published tariffs.

For the proposition that the carriers may collect and retain charges from published tariffs which are in violation of a Commission order without liability, the carriers cite several cases, none of which support the contention and most of which support the exact opposite. One such case is *Alouette Peat,* discussed above. Another is Chase & Co., Inc. v. Atlantic Coast Line R. Co., 220 I.C.C. 398 (1937), and cases cited therein. Apparently the carriers are referring to the following language in the Commission's opinion:

> "Rates filed with the Commission and published in the manner provided by law are the applicable rates even though they differ from the rates prescribed in an outstanding order of the Commission. Ralston Purina Co., Inc. v. Atlanta, B. & C. R. Co., 174 I.C.C. 722, by division 5; Dewey Portland Cement Co. v. Atchison, T. & S. F. Ry. Co., 185 I.C.C. 233, by division 2; Dewey Portland Cement Co. v. Atchison, T. & S. F. Ry. Co., 188 IC.C. 97, by division 5; Texas Produce Co. v. Illinois Central R. Co., 209 I.C.C. 113, by division 3." 220 I.C.C. at 400.

But in that case the Commission was only recognizing the rule emphasized here, that the published rate is the applicable rate which may be collected during shipment. It did not hold and did not purport to hold that the published applicable rate was the lawful rate which the carrier was entitled to keep. In every single case cited by the Commis-

sion, where a timely action was brought by the shippers, and *where the carriers published tariffs which were found to have violated a Commission order, the Commission ordered reparations.* In the *Chase* case itself, the Commission found that the carriers had complied with its order and refused reparations.

The carriers also cite Chicago, I. & L. Ry. Co. v. International Milling Co., 43 F. 2d 93 (8th Cir.), cert. denied, 282 U.S. 885, 51 S.Ct. 89, 75 L.Ed. 781 (1930), decided by our Circuit. The case is of doubtful relevance to this situation, but to the extent that it is relevant it also is contrary to the carriers' position. There the carriers apparently had on file two tariffs applicable to the same shipment. The later filed tariff set lower rates than the earlier one. The carriers accepted a shipment at the lower rates and then sued to collect the higher rates in the earlier tariff, contending that it was the applicable tariff because they had not complied with a Commission rule requiring that a new tariff specifically state which prior tariffs were canceled. We held that the lower rate was applicable. There the carriers contended that they were entitled to collect a higher rate because they had not complied with a Commission rule. Here the carriers contend that they are entitled to keep a higher rate because they have not complied with a Commission order. In neither case is the contention sound.

Only a few words need be said concerning the suggestion that the carriers are entitled to keep the charges because the tariffs remained in effect because of the temporary restraining order. The language quoted from the Supreme Court's *Inland Steel* decision, *supra,* disposes of this contention, as do most of the cases discussed above relating to the general principles of restitution. *See also* Socony Mobile Oil Co. v. Brooklyn Union Gas Co., 299 F.2d 692 (5th Cir.), cert. denied, 371 U.S. 887, 83 S.Ct. 182, 9 L.Ed.2d 121, affirming Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp., 201 F.Supp. 679 (S.D.Tex.1960).

VI. Standards for Restraint of Agency Orders

Certain concluding observations are necessary in order to put the above discussion of the carriers' affirmative contentions in the proper perspective. Up to this point we have discussed these contentions in the context of the remedy of restitution as it relates to other aspects of carrier-rate regulations—e.g., the *T.I.M.E.* decision, reparations, over-charges, remedies for unlawful practices under the *Hewitt-Robins* doctrine, etc. This focus arises because of the carriers' insistence that the restitutional remedy is forbidden by the Interstate Commerce Act. As a matter of legal analysis, this focus is too narrow. In the context of this case, the question of restitution arises because the carriers invoked the aid of the federal courts performing their equitable functions. Traditionally, the restitution remedy has been available to persons who are injured by the restraint of an administrative agency order where that restraint was not warranted.[4] If we were to hold that the remedy is not available in proceedings to review Interstate Commerce Commission orders, that would be equivalent to holding that Congress intended the federal courts, in staying orders of the Commission, had significantly limited powers to protect the interests of affected parties and had authorized a misuse of the court's equitable process.

In setting out procedures to be followed on review of Commission orders, Congress has carefully insured that the public interest be protected. Recognizing the importance of review of administrative action to the regulatory process, it has required that review to be by a three-judge dis-

[4] We recognize that the issuance, often ex parte, of a temporary restraining order is a necessary and not uncommon practice to preserve the status quo and prevent claimed irreparable injury. In referring to an improvidently issued temporary restraining order, we are not implying that the judge in any way acted improperly. Rather, the restraint is wrongful or improvident in the sense that the party who obtained its benefit is later found not to have been entitled to it or has failed to prevail on the merits.

trict court rather than a single judge. In order to assure prompt settlement of the issues, direct appeal to the Supreme Court is authorized, thus bypassing the ordinary intermediate review in Courts of Appeals and discretionary review by way of certiorari. No injunctions can be issued, except by a panel of three judges, and hearings on injunctions are to be expedited. Most importantly for purposes of the instant case, temporary restraining orders are not to be granted except upon written findings of irreparable injury. Courts have been careful not to interfere unduly with the administrative process and have developed standards by which to determine whether a stay of an administrative order is to be granted. The effect of the stay upon all parties to the proceeding, as well as the public interest, is carefully considered. Under these standards, it is clear that injury alone to the party seeking review, even irreparable injury, is not in and of itself sufficient to justify the stay. The court below was quite cognizant that the stay in this case would injure other persons and went to some lengths to protect them. If we were to hold that protection could not be afforded by allowing restitution where it is clearly warranted, that would be a strong argument for not granting a stay.

[21] The case most clearly setting out these standards for a mporary stay of a Commission order is Virginia Petroleum Jobbers Assoc. v. Federal Power Commission, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958):

> "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? * * * (2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. * * * (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? On this side of the coin, we must determine

whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents. (4) Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial." 259 F.2d at 925.

Baggett Transportation Co. v. Hughes Transportation, Inc., 393 F.2d 710 (8th Cir.), cert. denied, 393 U.S. 936, 89 S.Ct. 297, 21 L.Ed.2d 272 (1968); Braswell Motor Freight, Inc. v. United States, 297 F.Supp. 215 (S.D. Miss. 1969).

[22] From these considerations, it is evident that the federal courts must be exceedingly careful in granting the extraordinary relief of a stay of an agency order. It follows that once that power has been exercised, they must be equally careful in assuring that all parties affected are protected insofar as possible. Where restitution provides that protection and is warranted, it should be granted. Nothing in the Interstate Commerce Act should be construed to require a contrary result.

VII. The Equities of Restitution in the Instant Case

We have concluded that the cancellation order of the Interstate Commerce Commission made it unlawful for the carriers to collect charges under that tariff following the effective date of the order, that the effect of the order was to compel a reduction of rates to the pre-existing level, and that the carriers can be compelled to make restitution for higher rates charged in violation of the order which are collected by virtue of a court's restraint of an order not proved to be invalid. This does not dispose of all the problems in the instant case, for the carriers contend that there

was no wrongful restraint in this case, and that the decision of the trial court that there are no equitable grounds for relief is adequately supported by the record.

[23, 24] The contention that the restraint in this case was not wrongful is based on the fact that there was no final decision on the merits of the validity of the Commission's cancellation order. Since there was no such final decision, the carriers argue that the possibility remains that the Commission's order was invalid, that they were entitled to maintain the challenged tariffs, and consequently that the shippers would not have been entitled to restitution. Thus they conclude that without such a final determination on the merits, there can be no legal basis for awarding restitution. The fundamental error in this analysis is the tacit assumption that because they chose to challenge the Commission's order in court, that order somehow became less final or its validity became open to question. This assumption is erroneous.

> "[T]he Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid. * * *" Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602, 64 S.Ct. 281, 288, 88 L.Ed. 333 (1944).

See also Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503, 512-513, 64 S.Ct. 1129, 88 L.Ed. 1420 (1944). The Commission's order was at all times binding upon the carriers until they successfully concluded a suit proving its invalidity; and restitution may be ordered for higher rates collected in violation of the order by virtue of the court's injunctive process in the absence of a final decision setting aside the order. This conclusion is supported by the following reasons.

First of all, prior case law is consistent with this conclusion. In the *Arkadelphia* case, discussed above, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517, the carriers made a similar argument. There the carriers' suit against the state rates was dismissed *without prejudice* because they failed to sustain their burden of proof to show the invalidity of the rates. When restitution was then ordered, the carriers argued that the dismissal without prejudice left the rights of the parties in doubt. But the Supreme Court held that restitution was proper so long as the state rate order remained in effect.

Another analogous situation was present in *Ex parte Lincoln Gas*, 256 U.S. 512, 41 S.Ct. 558, 65 L.Ed. 1066, also discussed above. There a district court upheld the validity of a municipal gas rate ordinance in 1915, but stayed its operation pending appeal. In 1919, the Supreme Court affirmed the decision, with the modification that it be without prejudice for the period following 1915, taking judicial notice that increased labor costs and returns on capital following World War I might render it noncompensatory. On remand, restitution was ordered for the 1915-1919 period during which the injunction was in effect pending appeal. This was held proper on the grounds that the ordinance was presumptively valid until the companies successfully concluded a suit against it.

[25] This conclusion is also consistent with the generally adopted position that the voluntary dismissal of an injunction suit by a plaintiff without the consent of the defendant is a determination of the merits of a controversy so as to render the plaintiff and his sureties liable on the injunction bond. See "Annotation: Dismissal of Injunction Action or Bill without Prejudice as Breach of Injunction Bond," 91 A.L.R.2d 1312 (1963). Here the carriers by their own actions rendered the issues in the main suit moot and procured the dismissal. They received the benefit of the temporary restraining order without ever proving

the Commission order invalid; such proof is a prerequisite to the absolution of liability for those benefits.

[26, 27] It is also significant in this case that while there has not been a determination on the merits of the ICC order, there has been a determination that the carriers were not entitled to injunctive relief from the order. The denial of the interlocutory injunction on the grounds of the "remote possibility" of the carriers' success on the merits is clearly a decision that the carriers should be required to comply with the Commission order until they successfully completed a suit against it. The standards discussed above with respect to stays of administrative agency orders apply equally to temporary restraining orders and interlocutory or temporary injunctions. Where a party fails to prove grounds sufficient for the grant of an interlocutory injunction, he at the same time shows that the temporary restraining order should not have been granted, at least to the extent of rendering him liable in restitution for benefits received under the temporary restraining order. The carriers in *Arkadelphia* argued that the denial of the permanent injunction did not determine that the temporary injunction was wrongfully issued. The Supreme Court held that the failure to carry their burden of proof on the permanent injunction was itself sufficient to show that the temporary injunction should not have been allowed. So here, the failure to carry the burden of proof on the interlocutory injunction shows that the temporary restraining order should not have been issued, in the absence of a later decision in the carriers' favor on the merits.

It is now necessary to consider the equitable grounds of the Three-Judge District Court's decision denying restitution. It should be pointed out that nothing in that opinion suggested that the court felt it was without power to award restitution should the circumstances warrant. Rather, its decision rested on its assessment of the equities of the situation. In this respect, we think the decision was clearly erroneous in four aspects.

First of all, it is quite clear that the Three-Judge Court proceeded on the assumption that if restitution were to be awarded in this case, a decision on the merits of the ICC order would be necessary. The Court's well-founded distaste for deciding moot issues more than likely affected its determination of the merits of the counterclaim. But in fact, as we have shown above, the shippers' right to restitution did not require a determination on the merits of the order. Once the Three-Judge Court decided that issue was moot, its statutory function was at an end and the case should have been referred to a single judge for determination of the counterclaims. Public Service Commission of Missouri v. Brashear, 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083 (1941).

Secondly, the Court found that the Commission had never determined the rates to be unlawful. This finding probably was a product of the carriers' insistence that the failure to sustain the burden of proof under § 316(g) does not render the tariff unlawful. But we have held above in the third part of this decision that such a failure, *combined with* a cancellation order does render the tariff unlawful. This is of course to be distinguished from a finding of unlawfulness because of some substantive violation of the Act, but nevertheless, the tariff was unlawful as of the cancelation date of the Commission order and remained so until the carriers proved the order invalid.

Thirdly, the court suggested that to order restitution would imply an affirmative determination of the Court that the rates were unjust and unreasonable. Such a determination is within the primary jurisdiction of the Commission. But awarding restitution would not imply such a finding. It would merely recognize the effect of the Commission order, which we have shown to require a reduction in the carriers' rates in the context of this case. Restitution is the proper remedy to return the parties to the position they would have been in had the Commission's order not been judicially restrained.

Finally, the Court was understandably influenced by the Commission's order of September 30 postponing compliance until October 11. However, this order does not and cannot affect the shippers' right to restitution for the period of the court's temporary restraining order. We may note here that the Commission's explanation of its order is not entirely satisfactory. When the carriers applied for their temporary restraining order on September 9, they had only four more days until the compliance date of September 13. The Commission at that point had not considered it justified to extend the compliance date any further. When the interlocutory injunction was denied on September 24, the temporary restraining order was extended for five more days until September 29. Thus the carriers had at least one more day to comply with the order than the Commission had granted, and actually had had a total of two weeks extra. For the Commission to contend that its September 30 postponement was entered solely because of the court's restraint simply does not make sense. Nothing in the Court's order compelled such a result. However, we need not be concerned here with the reasons for the Commission's action, for it is quite clear that the order was not retroactive, and hence cannot affect the restitutional rights of the parties during the period when the court had jurisdiction of the case. A similar situation arose in Inland Steel Co. v. United States, 306 U.S. 153, 59 S.Ct. 415, 83 L.Ed. 557 (1939), where the Commission stayed an order that was being reviewed in the courts. Once the order was affirmed, the parties contended that the Commission's stay prevented restitution. But the Supreme Court held that "since the court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the court's jurisdiction. * * *" *Id.* at 160, 59 S.Ct. at 419. And restitution was proper in spite of the stay order.

The decision is reversed and remanded for further proceedings consistent with this opinion.

APPENDIX B

Order of September 5, 1968

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-65 Civ. 285

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., *Intervenors*.

MEMORANDUM ORDER

Harold C. Evarts, Minneapolis, Minnesota, Roland Rice, Washington, D. C. (George D. Michalson, Kansas City, Missouri, and Best, Flanagan, Lewis, Simonet and Bellows, Minneapolis, Minnesota, of counsel) appeared for plaintiffs;

Manny H. Smith, Interstate Commerce Commission, Washington, D. C., appeared for defendants;

Patrick J. Foley, United States Attorney, Minneapolis, Minnesota, Edwin L. Weisl, Jr., Assistant Attorney General, and Russell Chapin and Robert Mandel, Department of Justice, Washington, D. C., filed a brief for the United States of America as intervenor;

Philip H. Porter, Madison, Wisconsin, filed a brief in behalf of the Wisconsin Manufacturers' Association, intervenor;

Arthur Arsham, New York, New York, Richard M. Bowman, of Cant, Haverstock, Gray, Plant and Mooty, Minneapolis, Minnesota, and John J. C. Martin, New York, New York, appeared for the remaining intervenors.

Before BLACKMUN, Circuit Judge, DEVITT, Chief District Judge, and NORDBYE, District Judge.

NORDBYE, District Judge.

This long and unduly protracted proceeding had its genesis in the United States District Court for the District of Minnesota on September 9, 1965, when that court, upon the complaint and motion of the plaintiffs and upon condition that a bond in the sum of $200,000 be filed, entered a temporary restraining order enjoining the Interstate Commerce Commission and the United States from enforcing an order of February 24, 1965, 325 ICC 106, wherein the Commission in the proceeding designated as I. & S. Docket No. M-17450, LTL CLASS RATES AND MINIMUM CHARGES—MIDWEST AND CENTRAL TERRITORIES, determined that certain schedules for increases in less than truck load class rates and minimum charges filed by plaintiffs were "not shown to be just and reasonable." The proposed rate schedules of the plaintiffs were to become effective on July 1, 1963, but by order of the Commission on June 26, 1963, the schedules were stayed. Several orders were thereafter entered by the Commission with respect to these proposed rate schedules, and later the date for compliance with the report and order of the Commission was made on February 24, 1965, but by subsequent order the compliance was postponed to September 13, 1965. The effective date of the temporary restraining order of September 9, 1965, was September 13, 1965.

A hearing was held on September 16 and 17, 1965, before the District Court at which time various shipping associations, Chambers of Commerce, and shippers which were parties to the proceedings before the Commission in No. M-17450 were permitted to intervene herein. On September 20, 1965, the District Court made its order extending its temporary restraining order pending a motion of the plaintiffs for an interlocutory injunction before a three-judge court upon the condition that increased substituted bonds in the amount of $300,000 in the form to be approved

by the court be filed by the plaintiffs. The plaintiffs filed two new bonds, one for $100,000 and the other for $200,000. These bonds filed as a condition for the granting of the temporary restraining order provided that

> "NOW, THEREFORE, the condition of this obligation is such that if the order of the Interstate Commerce Commission entered in its docket I & S M-17450 on February 24, 1965, shall be finally affirmed, then if plaintiffs shall well and truly pay, or cause to be paid, to any and all consignors, consignees and others, any costs or damages sustained by reason of all sums paid in excess of rates or charges which would have been applicable on September 13, 1965, and thereafter in compliance with the Interstate Commerce Commission's said order, then this obligation shall be void; otherwise it shall remain in full force and effect."

This proceeding initially came before this three-judge court on September 24, 1965, on plaintiffs' motion for a temporary injunction, and on that date, after argument, this court orally denied plaintiffs' motion for a preliminary injunction and stated that on intervenors' motion the temporary restraining order heretofore entered by the District Court would be dissolved. Thereupon plaintiffs requested a stay of five days, and it was on September 29, 1965, that this court by written order denied plaintiffs' motion for a temporary injunction and dissolved the temporary restraining order.

The issue as to the validity of the Commission's order of February 24, 1965, and the liability, if any, of the plaintiffs and their surety to these intervenors under the bonds filed as a condition for the issuance of the temporary restraining order came before this three-judge court on July 9, 1968. Plaintiffs made a motion to dismiss the complaint without prejudice, discharge the bonds, and to strike the counterclaim. The defendants and intervenors sought a denial of plaintiffs' motions and an affirmance of the Commission's order requiring cancellation of the rates which

were not found to be just and reasonable by the Commission's order of February 24, 1965. The intervenors further seek appropriate accounting under the injunction bonds and for a restitution of the moneys collected by the plaintiffs and other carriers participating in the tariffs involved in excess of that which would have been legally chargeable by them under the Commission's order of February 24, 1965, during the period from September 13, 1965, to September 29, 1965, inclusive. At the hearing of July 9, 1968, it appeared that plaintiffs had obtained new rates from the Commission which became effective November 16, 1965, and that these new rates gave plaintiffs a rate schedule which granted the carriers a return in excess of the rates which the Commission found in its February 24, 1965, order as lacking a showing which would justify a finding that the proposed rates were "just and reasonable." It appears that following this court's denial of the preliminary injunction and the discharge of the temporary restraining order, plaintiffs sought and obtained on September 30, 1965, an order from the Interstate Commerce Commission which reads:

"INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. M-17450

LTL CLASS RATES AND MINIMUM CHARGES—
MIDWEST AND CENTRAL TERRITORIES

PRESENT: Charles A. Webb, Chairman, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding; the institution on September 9, 1965, of an action before the United States District Court for the District of Minnesota, Civil Action No. 4-65 Civil 285, *Middle West Motor Freight Bureau,* et al. v. *United States,* to set aside the report and order of the Commission, entered February 24, 1965, in the above-entitled proceeding; the denial by the three-judge court on September 24, 1965, of plaintiffs' Mo-

tion for Interlocutory Injunction; and good cause appearing therefor:

It is ordered, That the date on which the respondents are required to cancel the schedules at issue in the above-entitled proceeding, established as September 13, 1965, by order of the Commission entered July 23, 1965, be, and it is hereby, postponed to October 11, 1965, without change in the requirements of said order;

It is further ordered, That the respondents be, and they are hereby authorized, to reestablish such rates and provisions as were in effect prior to the issuance of the suspension order in this proceeding, upon not less than one day's notice to the Commission and the general public by filing and posting in the manner prescribed by the Commission under Section 217 of the Interstate Commerce Act.

Dated at Washington, D. C., this 30th day of September, A. D. 1965.

By the Commission, Chairman Webb.

(Signed) H. NEIL GARSON
H. Neil Garson
Secretary"

(SEAL)

At the outset we are confronted with plaintiffs' motions which give rise to the question as to the mootness of the proceedings instituted by them on September 9, 1965, wherein they sought to set aside, vacate and annul the order of the Interstate Commerce Commission of February 24, 1965 (as amended by its order of July 23, 1965), and permanently enjoin the Commission from enforcing or attempting to enforce said order. In that it appears that plaintiffs have now obtained an adequate rate relief from the Commission, they are not interested in seeking any equitable relief from this court as to the February 24, 1965, order of the Commission or otherwise. Obviously, in light of the record, the issues between plaintiffs and the Inter-

state Commerce Commission and the United States have become moot, and a dismissal should be granted unless the intervention of the intervenors with their counterclaims requires a finding of this court as to the merits of plaintiffs' action against the Commission as a condition precedent to the enforcement of said counterclaims. Certainly, this court has ancillary jurisdiction, at least as to the counterclaims filed. On the other hand, if upon the admitted facts the counterclaimants have no enforcible claims against plaintiffs or their surety, no purpose will be served in passing upon the merits of plaintiffs' complaint in that these entire proceedings would then be moot and plaintiffs' motions should be granted.

This brings us to the effect of the Commission's order of September 30, 1965. It is not contended that this order was intentionally directed by the Commission to the question of any liability which might be enforced by the intervenors against the plaintiffs or their surety by reason of this court's denial of the temporary injunction and the discharge of the temporary restraining order. However, it is clear that the Commission's order of September 30, 1965, did authorize these carriers to charge the challenged rate from September 13, 1965, to October 11, 1965, which not only encompassed the period of the temporary restraining order, but for some days beyond. And in making the order of September 30, 1965, it seems reasonable to conclude that the Commission determined that it would be *inequitable to require* the carriers to revert to the September 7, 1963, rate without affording them a reasonable period to continue with the challenged rate so that they could proceed with an application for increased rates. And the fact that as of November 16, 1965, the carriers were granted rate increases by the Commission which exceeded the return afforded by the challenged rates tends to confirm a finding that the Commission, with the other circumstances in support of the plaintiffs' petition, recognized the economic effect of the passage of some two years

since the challenged rates were first promulgated, to the extent that rate relief should be granted to the plaintiffs. In any event, the contention made by the intervenors that the Commission's order of September 30, 1965, merely intended to continue the challenged rates from September 30, 1965, to October 11, 1965, is clearly contrary to the express terms of the order. Where it appears that the September 30, 1965, order of the Commission approved the collection by the carriers of the challenged rates from September 13, 1965, to October 11, 1965, it necessarily follows that the temporary restraining order of the District Court did not inflict any damages to these intervenors. The intervention of the Commission in approving the collection of the challenged rates by the carriers from September 13, 1965, to October 11, 1965, rendered the temporary restraining order ineffective as a proximate cause of any rate damages to these intervenors. The delay of the plaintiffs in not effecting the date of the new rates until November 16, 1965, is of no concern in these proceedings.

The surety bonds filed by the carriers afford the intervenors no right against these plaintiffs or their surety unless the carriers by reason of the temporary restraining order charged higher rates than were legally justified. The intervenors' position necessarily must be that the court should affirm the Commission's order of February 24, 1965, and hold that the carriers should be relegated to the collection of the September 7, 1963, rates during the period of the temporary restraining order and their damages determined accordingly notwithstanding the Commission's order of September 30, 1965. It seems evident that the position of the intervenors is clearly untenable and cannot be sustained. We cannot say that the carriers should have charged the September 7, 1963, rates during the continuance of the temporary restraining order when the Commission had intervened thereafter and with its superior expertise has held that the carriers should continue with the challenged rate during that period. The undeniable

fact is that these intervenors during the injunction period did not pay any freight charges to these carriers which exceeded the rates set by the Commission. The granting of the temporary injunction inflicted no damage to them rate-wise. It is for the Commission to determine the legal rates during this period, and this it did by its *nunc pro tunc* order of September 30, 1965. Under the admitted facts, therefore, we are constrained to find that the issues in the complaint have now become moot. This necessarily follows because plaintiffs have obtained the rate relief from the Commission which they have requested. They are not interested, therefore, in seeking any relief from this court on their complaint against the Commission. Furthermore, in that plaintiffs have not collected any illegal or unlawful rates during the period of the temporary restraining order by reason of the intervention of the Commission's order of September 30, 1965, it must follow that no right of recovery exists in the counterclaims of these intervenors or others for whom they appear as against the plaintiffs or their surety.

The court adopts the foregoing as its Findings of Fact, and as Conclusions of Law,

It Is Ordered that the above proceeding is dismissed without prejudice, and that the counterclaims of the intervenors, and each of them, are dismissed and the surety bonds filed herein by the plaintiffs as a condition for the granting of the temporary restraining order by the District Court are dismissed and discharged. Judgment will be entered accordingly. Exceptions are reserved.

Dated this 5th day of September, 1968.

/s/ Harry A. Blackmun
United States Circuit Judge

/s/ Howard Devitt
United States District Judge

/s/ Kenneth Nordbye
United States District Judge

Order of April 9, 1969

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-65 Civ. 285

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., *Intervenors*.

MEMORANDUM ORDER

Before BLACKMUN, Circuit Judge, DEVITT, Chief District Judge, and NORDBYE, District Judge.

PER CURIAM:

The intervenors have filed motions for amended findings of fact, conclusions of law and order for judgment entered by this court on September 5, 1968, or for a new trial. The United States as a shipper has joined in these motions. In that the court's order of September 5, 1968, was based primarily upon its interpretation of the order of the Interstate Commerce Commission entered September 30, 1965, the United States of America, as statutory defendant, and the Interstate Commerce Commission, neither supporting nor opposing the intervening defendants' position herein, filed in this proceeding a joint statement of position on November 14, 1968, which reads, in part,

> "That the Commission's order was entered only as a result of this Court's stay is clear from the history

of the Commission's prior denial of the motor carriers' request for postponement of the effective date of the Commission report and order requiring the cancellation of the motor carriers' rate increases. Briefly, by order served August 4, 1965, the Commission denied the petition for reconsideration of the Middlewest Motor Freight Bureau. On August 18, 1965, the Bureau filed a 'Petition for Immediate Postponement of Compliance Date and For Rehearing.' By an order of August 30 (served August 31), the entire Commission denied this petition 'for the reason that sufficient grounds have not been presented to warrant granting the action sought.' On August 30, counsel retained by the Bureau wrote then Chairman Webb concerning this petition. * * * In this letter, referred to at the oral argument by defendants (transcript, at 53), counsel requested a meeting of the parties with the Chairman or with the Commission, urged that the Commission grant a rehearing, and in effect, requested that the Commission voluntarily stay its September 13 compliance date. In his reply of September 2, 1965, * * * Acting Chairman Bush noted that the order served August 31 denying the Bureau's petition seemed to have obviated the value of such a meeting. He further observed that in light of the reason for the Commission's denial, the Bureau, after complying with the order requiring cancellation, might wish to file new rate schedules. In conclusion, Acting Chairman Bush observed that the Bureau's alternative was to seek judicial review—the course the Bureau chose to pursue.

"Contrary to this Court's reading of the Commission's order of September 30, 1965, the Commission by entering that order did not approve or prescribe the higher rates during the interim period from September 13 to October 11, 1965. Under the statutory scheme, specifically Section 216, 49 U.S.C. § 316, carriers initiate and publish rates which remain in force

so long as a Commission order requiring their cancellation has not become effective."

It is apparent that the United States and the Interstate Commerce Commission have made it clear that they disagree with this court's interpretation of the Commission's order of September 30, 1965, as stated by this court in its order of September 5, 1968. In view thereof, we accept the portion of the order of the Commission wherein it stated that by entering the order of September 30, 1965, it "did not approve or prescribe the higher rates during the interim period from September 13 to October 11, 1965," and that "under the statutory scheme, specifically Section 216, 49 U.S.C. § 316, carriers initiate and publish rates which remain in force so long as a Commission order requiring their cancellation has not become effective." However, we are of the opinion that the construction given by this court in its order of September 5, 1968, to the Commission's order of September 30, 1965, is fully consonant with the language of that order. Certainly, the Commission had authority to continue the challenged rates in effect from September 13 to September 30, 1965, although the term "nunc pro tunc" as used by this court in its order of September 5, 1968, may be inappropriate and may be stricken. The carriers were permitted by the Commission to charge their published rates until September 13, 1965, although the Commission found that the carriers had not sustained the burden of proof in establishing the rates as just and reasonable. In entering the order of September 5, 1968, this court concluded that it was highly improbable that the Commission intended that there should be any break in the carriers' rates from September 13 to September 30, 1965, when the Commission apparently contemplated that new rates would come into effect not later than October 11, 1965. Regardless of whether the Commission did or did not by its order of September 30, 1965, "approve or prescribe" the higher rates from Sep-

tember 13 to October 11, 1965, we cannot escape the reasonable and persuasive conclusion that it would be highly inequitable for this court to order restitution to the shippers between September 13 and September 30, 1965, for the difference between the rates of September 6, 1963, and the challenged higher rates when admittedly the Commission intended by its order of September 30, 1965, that from September 30, 1965, to October 11, 1965, the higher rates should be approved.

The order of cancellation by the Commission of the challenged rates in question did not become effective on September 13, 1965, by reason of the restraining order issued by one of the judges of this court. The carriers therefore continued to charge their published rates from September 13, 1965, to September 30, 1965, and it must be recognized that these rates never have been pronounced unlawful by the Commission. It is our view, therefore, that notwithstanding the Commission's interpretation of its order of September 30, 1965, it does not follow from the entire record herein that these challenged rates were unjust and unreasonable during the period from September 13 to September 30, 1965, so as to justify the relief which the intervenors request. If the equities of the entire situation and the inadequacy of the September 6, 1963, rates justified the Commission's order permitting the challenged rates to become effective between the date of its order and October 11, 1965, it would be highly inequitable for this court to relegate the carriers to rates which admittedly were substantially lower than those which the Commission approved on November 16, 1965. The respite given by the Commission to the carriers to continue with the challenged rates from September 30 to October 11, 1965, strongly suggests that the Commission recognized that the lapse of time and the continued changing economic factors justified the relief which it afforded to the carriers in its order of September 30, 1965. The restraining order, therefore, issued by this court, in light of the history of these proceedings,

should be recognized as a continuance of the legally published rates and as effecting the same purposes and equities which the Commission achieved in its order of September 30, 1965. We conclude and find, therefore, that the rates charged by the carriers from September 13 to September 30, 1965, in light of the entire record and attendant circumstances, should not be considered as unjust and unreasonable by this court.

When the court used the term "intervenors" in its order of September 5, 1968, it intended to include the United States qua shipper and the order of September 5, 1968, may be amended accordingly.

It follows, therefore, that although we depart as stated herein from our interpretation of the Commission's order of September 30, 1965, as set forth in our order of September 5, 1968, in view of the entire record we adhere to the remaining findings of fact and conclusions of law set forth therein. Therefore, the motions of the intervenors and the United States qua shipper are in all things denied. It is so ordered. Exceptions are reserved. It may be noted that so far as the order of the District Court of February 2, 1967, in the above proceeding conflicts with this court's views as set forth in its order of September 5, 1968, or the views herein, it necessarily follows that to the extent of any conflict the order of February 2, 1967, is overruled.

This order is hereby made a part of the Findings of Fact, Conclusions of Law and Order for Judgment entered herein on September 5, 1968. It is so ordered.

Dated this 9th day of April, 1969.

/s/ HARRY A. BLACKMUN
United States Circuit Judge

/s/ HOWARD J. DEVITT
United States District Judge

/s/ KENNETH NORDBYE
United States District Judge

APPENDIX C

INVESTIGATION AND SUSPENSION DOCKET No. M-17450[1]
LTL CLASS RATES & MINIMUM CHARGES
BETWEEN MIDWEST AND CENTRAL
TERRITORIES

Decided February 24, 1965

Proposed increased less-than-truckload class rates and minimum charges within middlewest, between middlewest and central States territories, and between middlewest and Illinois territories found not shown to be just and reasonable. Schedules ordered canceled and proceeding discontinued.

Andrew N. Happer, J. D. Lawson, George D. Michalson, and *D. J. Quinn* for respondents.

John M. Agrey, S. W. W. Carr, John A. DuPont, Victor L. Emery, John I. Finsness, E. J. Hanson, John G. Ihnet, John J. C. Martin, Eugene J. Mielke, Carl E. Munson, Boyd L. Nelson, Philip H. Porter, C. Dale Ruffcorn, Jr., Paul Schliesser, Allan L. Timmerman, T. H. Troxel, and *Glenn R. Willman* for protestants.

Report and Order of the Commission

WEBB, *Chairman:*

Due and timely execution of our functions under section 216(g) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

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[1] In No. 34417, Increased Rates and Minimum Charges, Between Middlewest and Southwest, the parties have stipulated to be bound by the decision in this proceeding.

By schedules filed to become effective on July 1, 1963, and later, Middlewest Motor Freight Bureau proposed to establish, on behalf of its member carriers (the respondents), an increase of 50 cents in the minimum charge per shipment and a 5-percent increase in the less-than-truckload and any-quantity rates [2] within middlewest territory, between that territory and central States territory, and between middlewest and Illinois territories.[3] Although the proposal was suspended the order of suspension was vacated on August 8, 1963, but the investigation was continued. The increases became effective on September 7, 1963, and will be referred to herein as the proposed increases. Evidence in opposition to the proposal was presented by numerous parties.[4]

PROCEDURAL MATTERS

Objection is made to the receipt in evidence of a Highway Form B study of the financial data of 64 respondents taken from their 1962 annual reports. The data was placed on punchcards which were processed by a computer. A witness was available to explain the application of the formula

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[2] Rates, charges, and rate differences are stated in amounts per 100 pounds, unless otherwise indicated.

[3] The proposed rates have application between, to, or from points in Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming.

[4] The Nebraska State Railway Commission; Public Service Commission of North Dakota; South Dakota Public Utilities Commission; Minneapolis Traffic Association; Dubuque Traffic Association; Western South Dakota Traffic Bureau; Iowa Industrial Traffic League; Waterloo-Cedar Falls Traffic Association; Traffic Bureau of Sioux Falls; Chambers of Commerce of St. Joseph, Mo., Fargo and Grand Forks, N. Dak., Aberdeen, S. Dak., and Lincoln, Nebr.; Wisconsin Manufacturers Association; National Small Shipments Traffic Conference; Drug and Toilet Preparations Conference; and the Diana Manufacturing Company.

to the data and to stand cross-examination. The data is a matter of public record, and the formula is well known to the protestants. The objection is overruled.

Objection is taken to the receipt in evidence of "numerous studies" testified to by statistical witnesses on the ground that such witnesses could not stand cross-examination on the truth of the data on which the studies were based. Representatives of several respondents were available and were tendered for cross-examination. Underlying reports containing the raw data were made available to protestants' attorneys to aid in cross-examining carrier witnesses. Others were available to testify and stand cross-examination, but such testimony was ruled to be cumulative in nature and not necessary for the disposition of the issues. This objection is overruled since it is directed more to the weight to be accorded the evidence than to its admissibility.

A question presented is whether the auditor who prepared a carrier's annual report must be present before data from that report can be introduced in evidence. Carriers' annual reports are available to the public. Such a ruling would not only require the testimony and cross-examination of 458 auditors, but also the receipt in evidence of the annual reports of those carriers. Any such burdensome requirement would stifle the regulatory process.

Protestants object to respondents' introduction, on rebuttal, of evidence relating to differing transportation conditions which allegedly justify three scales of rates within and between various parts of the considered territory. The fact that respondents, in their case in chief, described in some detail the rate structure and their witness alluded to an imbalance of traffic does not preclude a more detailed presentation of similar facts on rebuttal. This objection is overruled.

Respondents renew their objection to certain exhibits introduced by the Lincoln Chamber of Commerce on the

ground that they are replete with errors and based on published material which is not considered to be a reliable source of information. This objection is overruled since it goes to the weight to be accorded the exhibits, not their admissibility.

Respondents moved to strike material in the brief of the National Small Shipments Conference which is taken from statements filed in the proceeding before the Suspension Board. Such statements are not sworn to, and, in the absence of stipulation, they cannot be considered as evidence. See *A. W. Hawkins, Inc.—Commodities, Middle Atlantic Terr.*, 403 I.C.C. 5, 6.

A final question is whether the examiner erred in not compelling respondents to furnish freight bills used in determining average route-miles of movement in computing costs. The reason for the request was the belief that such distances might have been derived from the use of tariff rate base numbers which would result in inflated distances in different segments of the considered territory. In view of our conclusions respecting the basic rate structure it is not necessary to rule on this matter.

The Rate Structure

The Commission, in *Western Trunk Line Class Rates*, 204 I.C.C. 595, prescribed a basis of rail class rates for application within western trunkline territory. This prescription was based on the division of that territory into three zones in appendix G to the original report (164 I.C.C. 1). In the motor carrier rate structure, middlewest territory corresponds roughly to western trunkline territory. The three tariffs at issue are Middlewest Motor Freight Bureau tariff 1-C MF-I.C.C. 397; tariff 2-A, MF-I.C.C. 355; and tariff 26-B, MF-I.C.C. 388. Tariffs 1-C and 2-A name rates between points within middlewest territory and between points in that territory and Illinois territory.

Tariff 26-B names rates between central States territory and middlewest territory.

Generally speaking, the motor carrier rate structure is related to the rail rate structure. The proposed increases do not alter the basic rate structure except for the 5-percent increase in the less-than-truckload class rates and the 50-cent increase in the minimum charge per shipment. The proposed rates are set out in the appendix, part I. The proposed minimum charge per shipment will in all instances exceed the charge for 100 pounds at the class 100 rates.

The class rates were increased generally by 5 percent in 1960, and the minimum charges were also increased. Effective March 25, 1961, the minimum charges were again increased. On August 25, 1962, rates on shipments weighing less than 1,000 pounds were increased by adding 30 cents to the first-class rates, and other classes were made percentages thereof. The proposed increases were then published to cover increased wages and related costs flowing from increases which became effective February 1, 1963, under the union labor contract. The minimum charges were again increased effective May 16, 1964. Those increases were not considered in this proceeding.

Financial Condition and Revenue Need of Respondents

There are 997 carriers participating in the 3 tariffs. Of these, 458 are either class I or class II carriers. Their 1962 operating revenues and expenses of $2,416,107,646 and $2,315,626,013, respectively, resulted in a composite weighted operating ratio of 95.8 percent.[5] Data taken from dues schedules of Middlewest Motor Freight Bureau indicates that all 458 carriers derived 19.6 percent of their

[5] Data for eight carriers was not available at the time the study was prepared.

system revenues from all tariffs published by Middlewest Motor Freight Bureau in which they participate. The corresponding revenues and expenses for 299 carriers[6] for the first 3 months of 1963 were $501,907,037, and $497,689,036, producing a composite weighted operating ratio of 99.2 percent.

The respondents, using various groups of class I and II carriers, have introduced a mass of data generally designed to prove that (1) their financial condition is acute as a result of increased labor costs, (2) the traffic involved is more expensive to handle than truckload traffic, and (3) the increases sought do not exceed a reasonable maximum level. To avoid undue confusion the various studies will be described separately, and the protestants' criticisms as well as our own will be noted.

58-carrier traffic study.—All class I and II carriers were requested to furnish a 1-day traffic survey. The instructions accompanying the survey form stated as follows: "The test day selected by you should be one day, *since September 1, 1962,* on which the volume of your traffic was fully representative of the *average daily volume* during the past twelve months." Although 70 carriers completed the survey only 58 carriers followed the instructions. Five of the 58 are not included in the list of 458 class I and II carriers and are presumably class III carriers. The shipments were tabulated to show those rated under each of the tariffs in issue, commodity rate tariffs generally, all other tariffs published by the bureau, or all other shipments handled. A summary of the study for the eight weight brackets showing (1) the number of shipments, (2) the average weight per shipment, (3) the reporting carrier's average revenue, (4) the total average revenue as shown on the freight bill, (5) the proposed

[6] Data for the remaining class I and II carriers was not available at the time this study was prepared.

average, revenue based on the rerating of each freight bill to reflect the proposed increases, the latter three in cents per 100 pounds, and the totals, are set out in the following table.

Weight bracket	Number of shipments	Average weight	Reporting carrier's revenue	Total revenue	Proposed revenue
		Pounds	*Cents*	*Cents*	*Cents*
Minimum charge	12,072	85	429	584	643
To 299	8,052	205	261	366	383
300-999	8,480	521	222	300	315
1,000-1,499	1,644	1,185	195	262	275
1,500-1,999	666	1,702	193	266	280
2,000-4,999	1,352	2,932	179	237	249
5,000 and over	381	6,980	163	224	235
Volume or truckload..	199	23,164	109	148	148
Total, class rated tariffs 1-C, 2-A, 26-B	32,846	652	191	260	272

Less-than-truckload (including minimum charge) shipments totaled 32,647, produced total revenue of $487,-722.90, and would have produced $514,688.98 under the proposal. As a result of the proposed increases the reporting carriers would have realized a 4.86-percent increase in revenues under the three tariffs at issue and a 1.06-percent increase in overall system revenues.

It is apparent from the foregoing that no serious effort was made to compile a study which would be representative of the carriers involved or of the day selected. In each instance the control factor was left to chance. That is, carriers who answered the survey correctly were assumed to be representative of the group and the day selected by each carrier was assumed to be representative of its operations. Data accumulated in this haphazard manner has little probative value.

64-carrier cost study.—Respondents utilized an IBM computer to develop 1962 average costs for 64 class I

and II carriers, 31 of which took part in the traffic survey. The application conformed to the procedures in Highway Form B. The following results were shown: line-haul costs of 35.773 cents per vehicle-mile or 0.15317 cent per hundredweight-mile; pickup and delivery costs of 15.547 cents per hundred pounds; platform costs of 20.557 cents per hundred pounds, and billing and collecting cost amounting to 65.705 cents per shipment. The average load was 23,354 pounds, while the average haul was 323 miles.

In addition, platform handling costs for shipments which moved on one test day were developed for 19 carriers. All these carriers were not included in the cost study whereas they all participated in the traffic study. According to the respondents these are the carriers that completed the survey as instructed. During the test day, 5,629 minimum charge and 9,693 other less-than-truckload shipments received 18,209 and 31,273 platform handlings, respectively. Out-of-pocket platform handling costs for single-line and joint-line minimum charge shipments handled were 12.02 and 41.36 cents per hundred pounds. The corresponding costs for other less-than-truckload shipments were 10.76 and 43.16 cents.

Cost-traffic study.—The respondents utilized data from the traffic and cost study groups to demonstrate their revenue need. Single-line and joint-line average weights for minimum charge and other less-than-truckload shipments were taken from the traffic study. Average length of haul for the various movements was based in part on the traffic study. Pickup and delivery costs were based on the average weights and the 1962 system average pickup and delivery costs for the appropriate weight bracket, as developed by the Highway Form B study of the cost study group. Platform handling costs were taken from the 19-carrier platform handling study. Billing and collecting costs were developed from the Highway Form B study. Terminal costs were also adjusted to reflect interchange

costs, using data in the 19-carrier study. Line-haul costs were developed by reducing the average load (23,354 pounds) of the Highway Form B study group by 5 percent to reflect the fact that truckload as well as less-than-truckload traffic was included in that study. As adjusted, the cost per hundredweight-mile, 0.15317 cent, became 0.16083 cent. The cost per hundredweight-mile was then multiplied by the average length of haul.

The following table reflects the results of this study. Out-of-pocket and fully distributed costs for 1962 and 1963 are on a weighted average basis. Fully distributed costs have been restated to include an allowance for profit necessary to produce an operating ratio of 93 percent. The 1963 costs also include an increase of 3.15 percent[7] to reflect current labor costs. Proposed revenue represents the average revenue for the two types of shipments as developed from the traffic study.

	Minimum charge	Less truckload other than minimum charge
	Weighted average	Weighted average
	Cents	*Cents*
Out-of-pocket cost	542.50	229.60
1962 fully distributed cost	639.23	270.54
1963 fully distributed cost	659.37	279.06
Proposed revenue	643	285
	Percent	*Percent*
Ratio of revenue to cost	97.52	102.12

For purposes of comparison, the use of platform handling weighing factors from statement No. 2-60, Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities—Middlewest Territory,

[7] Respondents state that this represents the percentage increase of 1963 wage increases over the 1962 level.

prepared by the Commission's cost finding section, would produce the following results:

	Minimum charge	Less truckload other than minimum charge
	Weighted average	Weighted average
	Cents	*Cents*
Out-of-pocket cost	554.69	242.56
1962 fully distributed cost	653.59	285.81
1963 fully distributed cost	674.18	294.81
Proposed revenue	643	285
	Percent	*Percent*
Ratio of revenue to cost	95.38	96.67

It is apparent from the foregoing discussion that these computations are suspect since they are grounded on the traffic study. That is, certain of the unit costs taken from the Highway Form B study were applied to data from the traffic study. Revenue projections were based on that study. As previously indicated, the deficiencies in the traffic study seriously impair its evidentiary value. Also, the 5-percent reduction in the average weight developed in the Form B study to eliminate truckload traffic would appear to be highly questionable. It would seem that the average weight of less-than-truckload traffic handed by the study group would be much lower. We conclude that this study is of little probative value.

121-carrier study.—This study is in two parts. The first part represents an attempt by the respondents to adjust the 1962 operating ratios of 121 carriers to reflect (1) the rate increase on this traffic which became effective August 25, 1962, (2) the proposed increases which became effective September 7, 1963, and (3) 1963 wage increases. By way of illustration, Abler Transfer, Inc., a member of the study group, had 1962 operating revenues of $407,830 and operating expenses of $363,482, resulting in an operating ratio

of 89.1 percent. First, to reflect the additional revenues from the August 25, 1962, increase on an annual basis it was determined by reference to the traffic survey that revenues derived from the proposed tariffs were 49.9 percent[8] of Abler's system revenues. Abler's 1962 operating revenues were multiplied by this percentage, producing $203,507.17. Since the increase was in effect for 4 months, two-thirds of the latter figure was taken to arrive at the operating revenue for the first 8 months. The result, $135,671, was multiplied by 2.44 percent, the percentage increase which would result from the application of the August 25 increase. On this basis the additional 1962 revenue accruing to Abler on an annual basis would have been $3,310. Second, the September 7, 1963, increase was calculated by again taking 49.9 percent of Abler's 1962 operating revenues. The resulting figure ($203,507.17) was multiplied by one-third and the product multiplied by 4.86 percent,[9] producing an increase of $3,296. The latter figure is designated by the respondents as "Increase in 1963 Revenues Resulting From September 7, 1963, Revenue Increase." Finally, Abler's 1962 operating expenses were increased by 3.15 percent (see footnote 7 for explanation). The 1962 operating expenses, as adjusted, are $374,932, whereas the operating revenues as increased are $421,028 (reflecting the August 25 increase, and the September 7 increase multiplied by three to place it on an annual basis).

As indicated, similar adjustments were made in the operating revenues and expenses of all study carriers. Total 1962 operating revenues and expenses for the study group

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[8] Abler, a member of the traffic study group, reported revenue from the instant tariffs of $573.88 whereas its total revenue for the day was $1,150.75. The relationship of these figures approximates 49.9 percent.

[9] This figure represents the average percentage increase in total revenues from the September 7 increase, as reflected by the data of the traffic study carriers.

were $454,112,552 and $442,648,031; as adjusted, they became $463,398,156 and $456,591,444. The composite weighted operating ratio increased from 97.5 to 98.5 percent.

This study is open to a number of criticisms. For example, use of the 49.9 percentage figure in adjusting Abler's 1962 operating revenues is suspect since it is derived from the traffic study which we have already found to be of little probative value. Moreover, only 36 of the carriers in the instant study were included in the traffic study. The percentages that the revenues from the proposal bear to system revenues was obtained from the remaining 85 carriers by telephone. No effort was made to verify the accuracy of these percentages. The percentages for the 36 carriers who participated in the traffic study also include truckload traffic handled on the test days under the 3 tariffs. Truckload traffic is not involved in this proceeding. Finally, in computing the increased revenues resulting from the September 7 increase, the respondents used 4.86 percent, also derived from the traffic study. This percentage was used to project the revenues of 85 carriers who, for reasons known only to themselves, refused to participate in the 1-day traffic study. In view of the foregoing deficiencies we find that the first part of the study is of little probative value.

The second part of the study is a summary of the operating ratios of the study group for 1960, 1961, 1962, the last 6 months of 1962, the first 6 months of 1963, and the 12-month period ended June 30, 1963. The corresponding average operating ratios were 98.4, 96.4, 97.5, 96.4, 97.9, and 97.2 percent.

142-carrier study.—As previously indicated, the respondents emphasize that recent wage increases and fringe benefits have substantially increased their operating expenses. The increases since 1960 are summarized in the appendix hereto, part II. These increases are a part of the agree-

ment under the so-called Central States Area contract. A majority of the motor carriers who participate in the three tariffs are parties to that labor contract.

The respondents utilize this study group to demonstrate the relationship of wages to total operating expenses. Total 1962 operating expenses for the study group were $966,904,325, and total wages paid represented 54.27 percent of this total, or $524,699,431. Pickup and delivery drivers and platform employees, line-haul drivers, and other employees' wages constituted 22.01, 15.64, and 16.62 percent of total wages paid. The largest portion of the 1962 wage expense was paid to the category of employees primarily devoted to the handling of less-than-truckload shipments. Operating revenues for the study group in 1962 were $1,013,895,814.

The study carriers also completed a form in which they restated their 1962 labor costs to current levels.[10] The instructions circulated with the form stated that the restated labor costs should reflect (1) the full effect of wage increases granted during 1962 and therefore not fully reflected in the 1962 expenses, (2) the effect of wage increases and fringe benefits which became effective February 1, 1963, and (3) the effect of increases made in the case of non-union operating and clerical employees to equalize increases in union contracts. The restated 1962 operating expenses for the group totaled $997,383,598, an increase of $30,479,273. The composite weighted operating ratio increased from 95.4 to 98.4 percent. Finally, the revenue needed to produce a 93-percent group operating ratio at the above-stated current level of labor costs was $58,559,670.

An examination of this study shows that the 1962 operating revenues of the study group do not fully reflect

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[10] According to the respondents this form is circulated to all class I and II carriers. Normally 200 to 300 carriers complete the form.

the August 25, 1962, increases; that is, the 1962 operating revenues would have been higher had the August increases been in effect for all of 1962. This cannot be considered as negligible since the respondents used 2.44 percent as an adjustment factor to reflect the August 25 increases in the 121-carrier study.[11] Moreover, the form completed by the study group contains six headings[12] under each of which there is a subheading entitled "supervisory." There is an additional subheading under Administrative and General entitled "Officers, Owners, Partners." In many cases the study carriers have shown increases under these subheadings when restating their costs to current levels without further explanation. The total increase for the study group under these subheadings is $1,997,497. While it may be true that the salaries of supervisory personnel in certain of these categories may be either related to or subject to the so-called Central States Area union contract, the salaries of supervisory personnel in other categories such as Administrative and General, for instance, would not be so related. The respondents submitted no explanation of this matter. A final consideration is that the only manner in which the restated costs have been related to the considered traffic is by showing that pickup and delivery drivers' and platform employees' wages constituted 22.01 percent of total 1962 wages for the study group. While it is true that the cost of handling less-than-truckload traffic has increased, it cannot be argued that this is the only factor responsible for the increase in the restated costs of the study group.

For the reasons hereinbefore stated we find that the restated costs of the study group are of little probative value.

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[11] The respondents state that the system revenues for a representative group of carriers increased only 0.63 percent.

[12] Equipment Maintenance and Garage; Transportation; Terminal; Sales, Tariff, and Advertising; Insurance and Safety; and Administrative and General.

56-carrier study.—This group is composed of carriers who participated in statement No. 2-60. Although 77 carriers participated in that study 21 have been eliminated for one of the following reasons: merger with another company, bankruptcy, surveys unavailable, or traffic not representative of that handled in the territory. The composite weighted 1962 operating ratio of the study group was 97.6 percent while the group operating ratio was 101.1 percent for the first quarter of 1963.[13] Also, the 1962 operating revenues of 35 group carriers were restated to reflect the August 25, 1962, and the September 7, 1963, increases on an annual basis. These carriers had participated in the 142-carrier study, and their 1962 operating expenses were restated to reflect current wage and cost levels. The composite weighted operating ratio as restated would be 98.6 percent, and the revenue needed to produce an operating ratio of 93 percent would be $16,571,330.

The method of increasing 1962 operating revenues to reflect the August 25 and September 7 increases on an annual basis varies from that used in connection with the 121-carrier study group since the increased 1962 operating revenues of various carriers included in each of the studies do not correspond. The method used in the instant study is not clearly explained. Also, the weaknesses in the form used in the 142-carrier study which we detailed in our discussion of that study have equal application here. For these reasons, we attach little importance to this study.

MISCELLANEOUS STUDIES

1. *Asset-liability ratio.*—In connection with the issue of revenue need, respondents presented evidence of the ratios of current assets to current liabilities in the trucking busi-

[13] Buckingham Express, Inc., and Buckingham Transfer, Inc., were eliminated from the quarterly study since they had merged with the United-Buckingham Freight Lines.

ness as compared with such ratios in other businesses. Current assets of the statement No. 2-60 study group for the year ended December 31, 1962, totaled $50,248,376 and current liabilities, excluding long-term debt due within 1 year totaled $45,774,108, for a ratio of 1.10. Inclusion of long-term debt due within 1 year in current liabilities changed the ratio to 0.79. The corresponding ratios for the latest 1963 period (generally May 31) were 1.11 and 0.82. The following table contrasts the foregoing ratios with similar ratios of current assets to current liabilities for other businesses, taken from the "Federal Trade Commission-Securities And Exchange Commission Quarterly Financial Report for Manufacturing Corporations, First Quarter-1963." Ratios for the last quarter of 1962 are presumably taken from the same source.

Type of business	Fourth quarter 1962	First quarter 1963
All manufacturing corporations, except newspaper	2.47	2.48
Food and kindred products	2.32	2.43
Bakery products	2.02	2.07
Tobacco manufacturers	3.66	3.55
Paper and allied products	2.59	2.67
Chemicals and allied products	2.78	2.83
Basic chemicals	2.70	2.80
Drugs	2.84	2.83
Petroleum refining	2.41	2.48
Durable goods	2.44	2.43
Nondurable goods	2.52	2.55

The comparison has little validity. Mining, processing, mercantile, and manufacturing enterprises must maintain large inventories of goods or raw materials thus making the period between expenditures and the related income much longer than in a service organization. Motor carriers maintain relatively small inventories. Materials and supplies are a very small percentage of total current assets. Motor carriers' accounts receivable are turned into cash much faster than is true of the compared industries

because of credit regulations. These factors reduce the current assets—current liability ratio. Long-term debt due within 1 year should not be considered without an accompanying analysis of reserves for payment of long-term debts. This account is normally shown with fixed assets.

2. *Carrier operating property and reserves.*—The annual reports of the statement No. 2-60 group were utilized to develop (1) the carrier operating property balance at the close of 1961 and 1962, (2) reserve for depreciation and amortization balance at close of each year, (3) depreciated investment, and (4) net income after income taxes. The 1961 and 1962 cumulative totals for each of the above are (1) $164,212,808 and $183,259,483, (2) $83,374,736 and $90,615,928, (3) $80,838,072 and $92,643,555, and (4) $8,630,778 and $3,402,541.

These were introduced to show that the increase in carrier operating property balance at the close of 1962 (the increase in investment), originated from a source other than 1962 net income. The respondents' witness admitted that he had not examined the study groups' balance sheets to determine whether this increase was attributable to borrowing money or from the sale of common stock. In the event the increase came from these sources it would indicate confidence on the part of lending institutions and investors in the future earnings of the motor carrier industry.

Data Concerning Affiliates

Information concerning the relationship between parent carriers and their affiliated companies is important in determining whether transactions between carriers and their affiliates result in raising the operating costs of the parent companies by shifting revenues to the affiliates.

The respondents submitted a study illustrating the financial effect of noncarrier affiliates on the parent corpora-

tions, based on available data for 1962. Of the class I and II carriers, 218 had nonmotor carrier affiliates and 232 either had no affiliates or carrier affiliates. Data was available for the remaining eight carriers. The composite weighted operating ratio was 96 percent for the first group and 95.4 percent for the second group, or an average of 95.8 percent for the entire group. Also, in a study of the 56 statement No. 2-60 carriers, 17 of which had no affiliates, the composite weighted 1962 operating ratio was 97.6 percent. The study shows amounts paid to affiliated companies, the total gross revenues of affiliated companies, the percentages that carrier payments were of gross revenues of affiliates, profit of affiliates, and profit of affiliates allocated to the carriers. The operating expenses of the carriers were adjusted by subtracting the allocated profit of the affiliated company from the carrier's operating expenses. With this "adjusted operating expense," the operating ratios were recomputed.[14] Where the profit of the affiliated company could not be ascertained, the total carrier payment to the affiliate was deducted from the carrier's operating expenses. As recomputed, the composite weighted operating ratio was 97.4 percent.

Efficiency of Operations

Information concerning efficiency of operations of the respondent carriers is important in determining whether

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[14] For example, the 1962 operating revenues and expenses for Admiral-Merchants Motor Freight, Inc., were $12,471,768 and $12,495,645, respectively, resulting in an operating ratio of 100.2. The total paid by it to all affiliates in 1962 was $789,315 whereas the gross revenue of the affiliated companies (or earned by individual of reporting carrier) was $848,158. The relationship of the total paid to all affiliates to the gross revenue of the affiliated companies was 93.06 percent. Taking 93.06 percent of the total profit of all affiliates, $58,843, reduces the profits of affiliates allocated to the carrier to $54,759. The latter figure was subtracted from the carrier's operating expenses and the restated 1962 operating ratio was 99.8 percent.

present carrier revenues are being protected by carrier efforts to cut costs. Several carrier witnesses testified concerning the efficiency of motor carrier operations. On an industrywide basis, much time and effort have been directed to studying operating problems. These include trailer interchange, use of leased wires for communication, material handling, improved machinery, tariff simplification, radio dispatch, and other subjects. Recommendations submitted to individual carriers have been adopted by more progressive carriers, where feasible.

Responsible officials of several carriers testified concerning efforts to increase efficiency in the industry. Among these were the construction of new terminals, installation of conveyor systems, use of "drag lines," purchase of large trailers, change in operation for more flexible dispatching and utilization of equipment, and employee meetings to improve morale. Many of these improvements are practical only at larger terminals where volume is sufficiently large to warrant capital expenditures which result in reductions in unit costs. Large capital expenditures are not economically sound for small carriers, or for operations at terminals lacking large volume.

Traffic Diversion

To some extent the respondents compete with railroads, freight forwarders, railway express, and parcel post for minimum-charge and less-than-truckload shipments. The areas of competition vary. Parcel post competes largely for minimum-charge shipments because of size and weight limitations. Freight forwarder competition is generally limited to larger urban areas. Railway express is becoming increasingly competitive, particularly in the area of multiple shipments. Except for parcel post, service to many small communities is almost exclusively by truck.

The respondents anticipate some diversion of traffic from the proposed increases but believe that it will have little effect on their revenues.

Discussion and Conclusions

Numerous motor carrier general increase proceedings involving strong shipper opposition have been considered in the past several years. As a consequence the evidence presented to justify a general increase in rates has been subjected to close scrutiny. In this proceeding it was specifically stated in the order of August 8, 1963, vacating the order of suspension and continuing the investigation, that a more complete record was necessary for a final determination of certain questions raised by the protestants.

The respondents introduced a mass of data at the hearing to show their unfavorable financial condition and their revenue need. We have summarized and commented upon each of the studies presented. Many of the studies contain statistical or other infirmities. In many instances we made subsidiary findings as to the lack of probative value of the particular study with our reasons for that conclusion. Repetition of those subsidiary findings at this juncture would serve no useful purpose. We therefore adopt and affirm our subsidiary findings as to the probative value of the studies presented.

The respondents' remaining evidence relative to revenue need consists of the operating ratios of the 458 class I and II carriers. They generally exceed 93 percent, which the respondents consider normal. We commented on the weight to be accorded operating ratios in *General Increase —Middle Atlantic & New England Ter.*, 319 I.C.C. 168, at page 176, as follows:

> While we have found in numerous motor carrier general-increase cases that an operating ratio of 93

> percent appears to be reasonable, we will expect in the future where operating ratios are used as a criterion for revenue need, that evidence of the expense items of representative carriers which form the basis for the operating ratios relied upon, will be given in more detail. The mere showing of present operating ratios of above 93 percent without a showing of the factors that make up such a ratio is not sufficient for our purposes.

The respondents had notice of our admonition in that proceeding prior to the time that the instant record was made. Moreover, in our order of August 8, 1963, we emphasized that a complete record was necessary. Yet the evidence presented to support the operating ratios has been found to be of little probative value. The mere fact that the operating ratios of the 458 class I and II carriers generally exceed 93 percent is not sufficient to support a finding that the revenue need of the respondents warrants approval of the proposed increases.

We do not question the fact that the respondents' labor costs under the Central States Area Contract increased February 1, 1963, nor that less-than-truckload traffic requires additional handling in many instances. However, the evidence is not convincing that this less-than-truckload traffic, which generally is not susceptible of diversion to other modes of transportation, should be subjected to an additional increase barely 1 year after the last increase became effective. It is true that the composite weighted operating ratio of 97.2 percent for the 121-carrier study group for the 12 months ended June 30, 1963, included the August 25, 1962 increase. However, we are unable to determine on this record whether or not a composite weighted operating ratio of 97.2 for the study group is unreasonably high. All things considered, we conclude that the evidence of record would not support a finding

that the imposition of the proposed increases on this traffic results in rates which do not exceed reasonable maxima.

A final consideration raised by certain protestants relates to the fact that, generally speaking, the basic motor carrier rates within, to, and from western trunkline zones II and III are higher, mile-for-mile, than comparable zone I rates.[15] As a result anomalous situations exist, such as higher rates for shorter hauls than for longer hauls via the same carrier over the same route. These problems are particularly troublesome from border points in zones II and III. While the evidence of record is meager on this point those respondent carriers which are parties to such rates have it within their power to avoid these unlawful inconsistencies, and must remove them unless they rebut the presumption of unreasonableness. *Accelerated Transport Pony Exp., Inc.* v. *United States,* 227 F. Supp. 815.

We find that the proposed increases are not shown to be just and reasonable.

VICE CHAIRMAN BUSH, dissenting:

I believe that practical considerations should temper our desire for the submission of the optimum in underlying data justifying the considered proposals. The operating ratio studies are sound. Of nearly 1,000 participating carriers, statistics were presented for 450 of the 458 class I and II carriers. The cost of assembling data, which falls upon the individual carriers, must be considered. Protestants, while challenging the representativeness of respondents' statistical presentations, have not submitted any rebutting evidence. Considering all the above factors,

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[15] As previously indicated western trunkline territory was divided into these zones in *Western Trunk Line Class Rates,* 164 I.C.C. 1, appendix G.

I would accept respondents' data as being reasonably persuasive that the proposed increases are justified.

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel on or before April 14, 1965, the schedules described in the order entered on June 26, 1963, by the Commission's Board of Suspension upon not less than one day's notice to the Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

APPENDIX

PART I

Column 1	Column 2	Column 3	Column 4	Column 5
Rate basis	Weight (in pounds)	Proposed rates (in cents)		
		Tariff 1-C	Tariff 2-A	Tariff 26-B
46-50	L.t.l.:			
	1-999	201	197	198
	1,000-1,999	169	166	167
	2,000-4,999	155	152	154
	5,000 and over	155	152	154
	T.l.	134	131	134
96-100	L.t.l.:			
	1-999	235	231	233
	1,000-1,999	204	200	202
	2,000-4,999	190	186	189
	5,000 and over	190	186	189
	T.l.	168	165	168

Column 1	Column 2	Column 3	Column 4	Column 5
Rate basis	Weight (in pounds)	Proposed rates (in cents)		
		Tariff 1-C	Tariff 2-A	Tariff 26-B
	L.t.l.:			
	1-999	265	259	264
	1,000-1,999	233	228	232
141-150	2,000-4,999	219	215	219
	5,000 and over	219	215	219
	T.l.	197	193	197
	L.t.l.:			
	1-999	289	282	288
	1,000-1,999	257	251	256
191-200	2,000-4,999	244	239	243
	5,000 and over	244	239	243
	T.l.	219	215	219
	L.t.l.:			
	1-999	336	331	334
	1,000-1,999	305	299	302
281-300	2,000-4,999	291	286	290
	5,000 and over	291	286	290
	T.l.	264	258	264
	L.t.l.:			
	1-999	378	371	377
	1,000-1,999	347	339	345
381-400	2,000-4,999	333	327	333
	5,000 and over	333	327	333
	T.l.	305	298	305
	L.t.l.:			
	1-999	418	410	416
	1,000-1,999	386	378	384
481-500	2,000-4,999	372	364	372
	5,000 and over	372	364	372
	T.l.	341	355	341
	L.t.l.:			
	1-999	454	445	452
	1,000-1,999	422	414	420
581-600	2,000-4,999	408	400	408
	5,000 and over	408	400	408
	T.l.	377	370	377
	L.t.l.:			
	1-999	492	484	491
	1,000-1,999	461	453	460
681-700	2,000-4,999	447	439	447
	5,000 and over	447	439	447
	T.l.	414	405	414

PART II

Comparison of wage rates and bases of contributions by carriers to employees' welfare funds applicable to carriers parties to Middlewest Motor Freight Bureau, agent, tariffs

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		Wage rates				
					Cumulative increase	
Employee classification	Effective on—	Per hour (in cents)	Per mile (in cents)	Increase (in cents)	In cents	Percent
Drivers, line-haul, all types of equipment.	Feb. 1, 1960	264	....	....	....	....
	Aug. 1, 1960	266	....	2	2	0.8
	Feb. 1, 1961	273	....	7	9	3.4
	Aug. 1, 1961	276	....	3	12	4.5
	Feb. 1, 1962	285	....	9	21	8.0
	Feb. 1, 1963	297	....	12	33	12.5
Drivers, line-haul, single-axle equipment.	Feb. 1, 1960	....	9.125	....	....	....
	Aug. 1, 1960	....	9.175	.05	.05	0.5
	Feb. 1, 1961	....	9.425	.25	.30	3.3
	Aug. 1, 1961	....	9.425	....	.30	3.3
	Feb. 1, 1962	....	9.700	.275	.58	6.3
	Feb. 1, 1963	....	10.000	.30	.88	9.6
Drivers, line-haul, 4-axle equipment.	Feb. 1, 1960	....	9.375	....	....	....
	Aug. 1, 1960	....	9.425	.05	.05	0.5
	Feb. 1, 1961	....	9.675	.25	.30	3.2
	Aug. 1, 1961	....	9.675	....	.30	3.2
	Feb. 1, 1962	....	9.950	.275	.58	6.1
	Feb. 1, 1963	....	10.250	.30	.88	9.3

Comparison of wage rates and bases of contributions by carriers to employees' welfare funds applicable to carriers parties to Middlewest Motor Freight Bureau, agent, tariffs—Continued

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		Wage rates				
					Cumulative increase	
Employee classification	Effective on—	Per hour (in cents)	Per mile (in cents)	Increase (in cents)	In cents	Percent
Drivers, line-haul, 5-axle equipment.	Feb. 1, 1960	....	9.500	....	....	....
	Aug. 1, 1960	....	9.550	.05	.05	0.5
	Feb. 1, 1961	....	9.800	.25	.30	3.2
	Aug. 1, 1961	....	9.800	....	.30	3.2
	Feb. 1, 1962	....	10.075	.275	.58	6.1
	Feb. 1, 1963	....	10.375	.30	.88	9.2
Drivers, line-haul, tandem-axle equipment loaded 40,000 pounds or more.	Feb. 1, 1960	....	9.625	....	....	....
	Aug. 1, 1960	....	9.675	.05	.05	0.5
	Feb. 1, 1961	....	9.925	.25	.30	3.1
	Aug. 1, 1961	....	9.925	....	.30	3.1
	Feb. 1, 1962	....	10.200	.275	.58	6.0
	Feb. 1, 1963	....	10.500	.30	.88	9.1
Drivers, pickup and delivery	Feb. 1, 1960	265	....	....	....	....
	Aug. 1, 1960	267	....	2	2	0.8
	Feb. 1, 1961	274	....	7	9	3.4
	Aug. 1, 1961	277	....	3	12	4.5
	Feb. 1, 1962	288	....	11	23	8.7
	Feb. 1, 1963	302	....	14	37	14.0
Platform employees (a)	Feb. 1, 1960	260	....	....	....	....
	Aug. 1, 1960	262	....	2	2	0.8
	Feb. 1, 1961	269	....	7	9	3.5
	Aug. 1, 1961	272	....	3	12	4.6
	Feb. 1, 1962	283	....	11	23	8.8
	Feb. 1, 1963	297	....	14	37	14.2

Comparison of wage rates and bases of contributions by carriers to employees' welfare funds applicable to carriers parties to Middlewest Motor Freight Bureau, agent, tariffs—Continued

Employee welfare fund	Effective on	Rate per week per employee (cents)	Length of time paid for at weekly rate of employee's wage
Health and welfare	Feb. 1, 1960	250	.....
	Feb. 1, 1961	300	.....
	Feb. 1, 1963	430	.....
Vacations	Feb. 1, 1960	..	1 week after 1 year's service. 2 weeks after 3 years' service. 3 weeks after 12 years' service. 4 weeks after 20 years' service.
	Feb. 1, 1961	..	1 week after 1 year's service. 2 weeks after 3 years' service. 3 weeks after 11 years' service. 4 weeks after 18 years' service.
Pensions	Feb. 1, 1960	460	.....
	Feb. 1, 1961	500	.....
	Feb. 1, 1963	600	.....

APPENDIX D

Statutes Involved

Administrative Procedure Act 5 USC

CHAPTER 7—JUDICIAL REVIEW

SEC. 701. APPLICATION; DEFINITIONS

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or

sections 1622, 1884, 1891-1902, and former section 1641 (b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Sec. 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Sec. 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Sec. 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application

for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

SEC. 705. RELIEF PENDING REVIEW

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

SEC. 706. SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

Interstate Commerce Act Sec. 204a (49 U.S.C. 304a)
ACTIONS FOR RECOVERY OF CHARGES; LIMITATION OF ACTIONS

SEC. 204a. (1) All actions at law by common carriers by motor vehicle subject to this part for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(2) For recovery of reparations, action at law shall be begun against common carriers by motor vehicle subject to this part within two years from the time the cause of action accrues, and not after, and for recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this part within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(3) If on or before expiration of the three-year period of limitation in paragraph (2) a common carrier by motor vehicle subject to this part begins action under paragraph (1) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(4) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(5) The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section (216 (e)) of this part, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

(6) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

(7) The provisions of this section shall apply only to cases in which the cause of action may accrue after the date of the enactment of this section.

(8) The provisions of this section 204a shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before any court or by or against carriers subject to this part: *Provided, however,* That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpay-

ment of such charges, or (C) deduction made under section 322 of the Transportation Act of 1940 (49 U. S. C. 66), whichever is later.

Sec. 216(b) (49 U.S.C. 316(b))

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

Sec. 216(d) (49 U.S.C. 316(d))

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 216(e) (49 U.S.C. 316(e))

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination

against interstate commerce or for any other purpose whatever.

Sec. 216(g) (49 U.S.C. 316 (g))

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided,* That this paragraph

shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

Sec. 217 (49 U.S.C. 317)

TARIFFS OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 217. (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall

refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided,* That the provisions of sections 1 (7) and 22[1] of part I shall apply to common carriers by motor vehicles subject to this part.

(c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) No common carrier by motor vehicle, unless otherwise provided by this part, shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part.

APPENDIX E

Order

Interstate Commerce Commission

I. & S. Docket No. M-17450

LTL Class Rates and Minimum Charges—
Midwest and Central Territories

Present: Charles A. Webb, Chairman, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding; the institution on September 9, 1965, of an action before the United States District Court for the District of Minnesota, Civil Action No. 4-65-Civil 285, *Middle West Motor Freight Bureau, et al.* v. *United States,* to set aside the report and order of the Commission, entered February 24, 1965, in the above-entitled proceeding; the denial by the three-judge court on September 24, 1965, of plaintiffs' Motion for Interlocutory Injunction; and good cause appearing therefor:

It is ordered, That the date on which the respondents are required to cancel the schedules at issue in the above-entitled proceeding, established as September 13, 1965, by order of the Commission entered July 23, 1965, be, and it is hereby, postponed to October 11, 1965, without change in the requirements of said order;

It is further ordered, That the respondents be, and they are hereby authorized, to reestablish such rates and provisions as were in effect prior to the issuance of the suspension order in this proceeding, upon not less than one day's notice to the Commission and the general public by filing and

posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act.

Dated at Washington, D. C., this 30th day of September, A. D. 1965.

By the Commission, Chairman Webb.

H. NEIL GARSON
Secretary

(Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

MIDDLEWEST MOTOR FREIGHT BUREAU, *et al.*,
Petitioners,

—v.—

UNITED STATES OF AMERICA and NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 433 F.2d 212 and is set forth as Appendix A to the Petition (Pet. A 1a-60a). The opinions of the District Court are unreported and appear in Appendix B (Pet. B 61a-68a; 69a-73a). The report and order of the Interstate Commerce Commission are reported at 325 I.C.C. 106 and appear as Appendix C (Pet. C 74a-100a).

Jurisdiction

Jurisdictional requisites are adequately recited in the Petition.

Question Presented

An Interstate Commerce Commission order directing motor carriers to cancel increased rate schedules was placed under a court restraining order that was afterward dissolved as improvidently issued. Whereupon the carriers moved to dismiss their own complaint without prejudice and that motion was granted. The question presented is the same as that defined by the Court of Appeals (Pet. 7a):

> "The question presently on this appeal is a relatively narrow one, namely whether the shippers are entitled to restitution from the carriers for the rates which were charged during the existence of the temporary restraining order, which rates were higher than those which could have been charged had the cancellation order gone into effect at the original compliance date of September 13."

However, petitioners' statement of the question (Pet. 2) embraces the proposition that restitution is dependent on two conditions precedent: (1) in addition to the court's determination that the restraint was improvidently issued, despite dismissal of the complaint on the carriers' own motion, there must be a court adjudication that the restrained Commission order was valid; and, (2) to the Commission adjudication in its investigation proceeding that the increases were not shown just and reasonable, there must be coupled a second adjudication by the Commission in a reparation action brought by the shippers that the increases were unjust and unreasonable.

Statutes Involved

Relevant provisions of the Interstate Commerce Act and the Administrative Procedure Act are set forth in Appendix D of the Petition (Pet. D 101a-110a). Relevant, but not included in the Petition, are the following provisions of the Judiciary and Judicial Procedure Act:

SEC. 2284(3)—28 U.S.C. § 2284(3).

THREE-JUDGE DISTRICT COURT; COMPOSITION; PROCEDURE

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

[(1) and (2) not relevant]

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

SEC. 2324—28 U.S.C. § 2324.

STAY OF COMMISSION'S ORDER

The pendency of an action to enjoin, set aside, or suspend any order of the Interstate Commerce Commis-

sion shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

Statement

Respondents are 15 shipper organizations and 2 state public service commissions,* all parties to the Commission proceeding which eventuated in the order directing cancellation of rate increases as not shown just and reasonable. They intervened in the District Court in defense of the Commission's order and counterclaimed for restitution on behalf of shippers and receivers of freight. When the District Court dismissed the proceeding as moot, discharged the injunction bond and dismissed the counterclaim, respondents appealed, first to this Court (which dismissed for lack of jurisdiction), then to the Court of Appeals whose judgment directing restitution the petitioners now seek to review by writ of certiorari.

In the opinion rendered by the Court of Appeals (by Gibson, Circuit Judge), the factual situation involved in this case is described with great clarity. The attention of

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* The respondents are: National Small Shipments Traffic Conference, Inc.; Drug and Toilet Preparation Traffic Conference; Nebraska State Railway Commission; North Dakota Public Service Commission; Aberdeen Chamber of Commerce; Iowa Industrial Traffic League; Chamber of Commerce of Fargo; Chamber of Commerce of Grand Forks; Lincoln Chamber of Commerce; Minneapolis Traffic Association; Omaha Chamber of Commerce; St. Joseph Chamber of Commerce; Traffic Bureau of Sioux Falls; Waterloo-Cedar Falls Traffic Association; Western South Dakota Traffic Bureau; Diana Manufacturing Company; Wisconsin Manufacturers' Association.

this Court is respectfully directed thereto (Pet. A 4a-7a) as a concise and revealing statement of the case. Certain facts and events assume importance in light of contentions put forth in the petition for certiorari. They merit special comment.

1. The Commission's report articulates, as the basis for its order directing cancellation of the increases, that evidence tendered by the carriers was "found to be of little probative value" and could not "support a finding that the imposition of the proposed increases on this traffic results in rates which do not exceed reasonable maxima." It also found anomalous situations in rates higher for short than long hauls and said responsible carriers "must remove them unless they rebut the presumption of unreasonableness" (Pet. C 94a-95a). Thus, the Commission concluded, the carriers failed to discharge their statutory burden of proving the rates just and reasonable and they were ordered cancelled.

2. The Commission order of cancellation of February 24, 1965, as is usual in an investigation of this sort, simply directed cancellation of the increases for failure of the carriers to discharge their burden of proof. Upon compliance with this order, the carriers were free to publish, on 30 days' notice, any rates they felt they could justify. The compliance date fixed by the order of cancellation was April 14, 1965. In the period between February 24th and April 14th the carriers did nothing by way of republishing new rates but petitioned for reconsideration and other relief. On July 23, 1965, the Commission issued its order denying the carrier petitions and fixing September 13, 1965, as the ultimate compliance date. Again the carriers did

nothing by way of republication until September 5, 1965, and at that date they filed a surcharge increase to take effect on 30 days' notice *i.e.* October 5, 1965. On September 9, 1965, the carriers filed their court suit and obtained a restraint on the Commission's order. When that was dissolved on September 29th, their surcharge increase schedules could have become effective only six days later. But they voluntarily postponed the October 5th effective date to November 16, 1965, fearing suspension. These events are revealing of the administrative remedies that were available—but unused—by the carriers. They are discussed by the Court of Appeals as significant of carrier manipulation of their rate prerogatives (Pet. A 42; 19a) and the reason for its conclusion that "in the absence of any carrier action to establish new rates where a tariff is found unlawful, the last lawful preexisting rates are the effective rates to be applied by a court in considering restitution" (Pet. A 19a). Those prior rates would have become effective but for the wrongful restraint on the Commission's order and they provide the precise measure of shipper damage occasioned by the restraint (Pet. A 20a).

3. The November 16th increase was not a republication of the increase that was ordered cancelled. It was termed "a temporary revenue measure" and, unlike the 5% *less-truckload* increase, was applicable to *all* shipments (Affidavit, J. D. Lawson, in support of motion to dismiss complaint, p. 6). These schedules were permitted to become effective. Petitioners state "Presumably the Commission was satisfied with the carriers' demonstration of revenue need . . ." (Pet. 6). This is contra-indicated by the fact that the Commission ordered investigation. The order stated "there is reason to institute an investigation to

determine whether [the per-shipment charges] are unjust and unreasonable . . .". The November 16th increase was never approved by the Commission. As noted in the opinion below (Pet. A 6a), when the surcharge increase was converted to hundred-weight rates, the new schedules were ordered suspended; substitute tariffs were filed and these were ordered suspended; upon cancellation by the carriers of the suspended matter, the Commission discontinued its investigation, nearly two years after the November 16th increases were allowed to take effect.

4. Dissolution by the three-judge court of the temporary restraining order was accompanied by findings and conclusions significant of the nature of "improvidence" in this case: [plaintiff carriers] "have adequate administrative remedies which will enable them to proceed with proposed new increased rates *already filed* with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates." [Emphasis added.]

5. On dissolution of the restraining order and effectuation of the November 16th increases, the carriers concluded that they had no further use for the court suit (Lawson Affidavit, p. 11: "Plaintiffs have no further interest in the validity or the invalidity of the Commission's order in Docket M-17450"). On September 28, 1966, they presented a motion to the District Court to strike the counterclaim and discharge the injunction bond, arguing that the case was now moot. The motion was denied by the District Court which held the counterclaim to be proper since "the facts are uncontroverted that the alleged injury suffered by the intervenors [the shippers] occurred as a direct result of the process of this Court which the plaintiff sought and obtained."

6. On September 25, 1967 the shipper parties moved to bring the case on for hearing on the merits. The carriers again took the position that the suit was moot; on October 2, 1967, they moved to dismiss their complaint without prejudice; to discharge the injunction bond; to dismiss the counterclaim. Their motion papers are extraordinarily revealing of an unequivocal position that the case was moot and a single-minded purpose to dismiss their own complaint. *No alternative relief was asked.* A copy of the motion to dismiss is annexed as Appendix A to this brief. After hearing held on July 9, 1968, the court on September 5, 1968 issued its judgment. It declined the shippers' request for a determination on the merits, granted the carriers' motion to dismiss the complaint without prejudice, dismissed the counterclaim, and discharged the injunction bond (Pet. B 61a-68a). On motion for amended findings of fact and conclusions of law, the three-judge court on April 9, 1969 issued a new memorandum opinion with revised findings but the same judgment (Pet. C 69a-73a). At no time did the petitioners recede from the position that they had mooted the case and that they were entitled to dismissal of their complaint without prejudice. In their brief (as respondents) to the Court of Appeals they said (p. 2):

> "Upon dissolution of a temporary restraining order issued at the request of the carriers and denial of their motion for a temporary injunction to permit hearing on the merits of their complaint, the carriers successfully moved to dismiss their complaint . . ."

They added a significant statement (p. 3):

> "The propriety of the dismissal of the complaint by the three-judge court below, convoked by authority of

> 28 U.S.C. 2321, et seq. to review the Commission order, is not here at issue, and that question is not presented by the respective Statements of Issue in either No. 19863 or No. 19870."

Following the judgment of the Court of Appeals reversing the district court and directing restitution, the carriers filed a petition for rehearing. Nowhere in that 25-page document did they ask for modification of the court's judgment with respect to dismissal of their complaint nor did they seek leave to file a motion for hearing on the merits of the complaint to obtain a determination as to the validity of the Commission's order. Instead they maintained (pp. 17-18):

> "There was, therefore, no subject matter upon which a review and remand could operate. The order of the Commission had been executed. The rate and tariff changes had been effectuated and the economic situation had been altered beyond recall. Literally, nothing was left for review . . . In these circumstances how can it be said that a moot decision and order of the Interstate Commerce Commission can be reviewed when absolutely no relief can be afforded the petitioning party—even if successful . . . Having found the appeal and review of the Commission order to be moot, all that remained was for the district court to declare it so and to vacate the order of the Commission on those grounds."

Today—in a petition for certiorari—the carriers invert the position steadfastly maintained below. They call for an adjudication of the merits of the complaint (Pet. 15).

Argument

As noted by the Court of Appeals, the issue in this case is relatively narrow, the doctrine of restitution deeply rooted in equity, the cases uniform in holding regulated carriers and utilities answerable to restitutional claimants (Pet. A 7a; 23a; 25a-29a). The facts of this case involve an injunctive restraint that was unquestionably wrongful, being both unnecessary and unjustified. It was unnecessary since administrative alternatives were undeniably at the carriers' disposal; it was unjustified since the complaint was shown to be of dubious virtue. In dissolving the restraining order, the three-judge court articulated both these reasons (Pet. A 5a). Soon thereafter the carriers saw no profit in their suit and moved its dismissal. Injury to the carriers' clients was directly attributable to restraint of the Commission's order since only the restraint prevented its enforcement on September 13th, the prescribed compliance date when rates at a reduced level would have had to become effective. The rates paid by the shippers on and after September 13th, laid against the rates they would have paid but for the injunctive restraint, measure the damage to shippers and the restitutional recovery that is their due.

On these facts the decision of the Court of Appeals is manifestly correct. There is no conflict of authorities, real or even asserted. The "special and important reasons" for review that petitioners see are but wishful. To make this a case of first impression is to turn one's back on *Ex Parte Lincoln Gas & Electric Co.*, 256 U.S. 512, allowing restitution against regulated utilities; on *Arkadelphia Milling Company* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, treating

with state-regulated carriers; *Bell* v. *United States,* 49 F. Supp. 505, dealing with carriers regulated under the Interstate Commerce Act; and, cases in every walk of commerce that are annotated to follow the lead of the cited authorities (*Restitution as Remedy for Wrongful Injunction,* 131 A.L.R. 878; *Interlocutory Injunctions and the Injunction Bond,* 73 Harv. L. Rev., 333). Specifically responsive to petitioners' assertion (Pet. 8) that they know of no federal court that has held that courts have power to make restitution of freight charges collected under applicable tariffs, independently of action by the Interstate Commerce Commission, is *Accelerated Transport-Pony Express Inc.* v. *United States,* 227 F. Supp. 815 (D.C. Vt. 1964), Aff'd 379 U.S. 4 (1964). The case is fully discussed by the Court of Appeals (Pet. A 28a-29a) which rejected in toto the carriers' attempt to deprecate the relevance of the decision. The court said (29a):

> "*Accelerated Transport* is clearly entitled to precedential value on this issue."

The petition raises no significant question relating to the well-established doctrine of restitution. No important question of federal law, not already adequately dealt with, requires deliberation by this Court. In their argument to the Court of Appeals, petitioners stated flatly (Brief, p. 20): "The Interstate Commerce Act precludes restitution." This remarkable dictum was rejected by the Court of Appeals as impossible to reconcile with the regulatory purpose of the Interstate Commerce Act or with equity's historic role to do equity (Pet. A 44a; 53a-55a). For that matter, *Inland Steel Co.* v. *United States,* 306 U.S. 153,

and *Bell* v. *United States, supra,* belie the manifesto that would abrogate the remedy with respect to carriers regulated under the Act. In their petition for certiorari, the statement of preclusion is gone. But its continuing effect is advocated by an argument that would introduce two preconditions to restitutional recovery: (1) a court adjudication in the injunction suit that the Commission order was valid; (2) a Commission adjudication in a separately to-be-instituted reparation suit that the rates are unlawful as unjust and unreasonable. No case has enunciated either proposition; the leading cases contradict both.

1. In *Arkadelphia Milling,* leading exponent of the restitutional remedy, there was no final adjudication of validity of the carriers' attack on the Commission-initiated rates; the judgment of remand directed dismissal of the railroad complaint without prejudice. *Allen* v. *St. Louis I. M. & S. Ry.,* 230 U.S. 553 at 560. The same was true in *Ex Parte Lincoln Gas.* The suit that challenged the rate ordinance was dismissed *without prejudice* (256 U.S. 512 at 515). Yet, a petition to the court for mandamus to nullify provisions made for restitution was denied on authority of *Arkadelphia Milling,* the court saying (at 517): "To retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate." In *Bell* v. *United States,* the Commission order that was under review was actually reversed by the Commission itself. Yet, the court awarded restitution for improvident restraint of the first order.

That an adjudication on the merits of the complaint is often encountered in restitution cases is far from a determination that it is condition precedent to restitutional re-

covery. The underlying basis for the remedy of restitution is improvidence in issuance of the injunctive restraint. Improvidence may reside in matters other than the validity of the order sustained. This was noted by the court below (Pet., 53a, ftnote 4). See also *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 52 (1938).

The statute that creates the procedure for review of a Commission order establishes the conditions for grant of a temporary restraint. Filing suit does not itself operate as a stay (28 U.S.C. § 2324). The district judge *may* grant a temporary restraining order but only to prevent irreparable damage and the order must contain "a specific finding based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted" (28 U.S.C. § 2284 (3)). A restraint was issued here on allegations of irreparable harm submitted by the carriers. Of inescapable significance is the explicit finding of the three-judge court made at the time it dissolved the restraining order and denied interlocutory injunction that the carriers had adequate administrative remedies available; increase tariffs were already on file with the Commission. Indeed, the increase tariffs were on file with the Commission when the restraining order was sought and obtained (Lawson Affidavit appended to carriers' motion to dismiss the complaint). In short, there was no threat of irreparable injury here. Any damage from effectuation of the Commission's order was not irreparable. As stated in *Virginia Petroleum Jobbers* v. *Federal P. C.*, 259 F.2d 921 (1958):

> "The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of time

and energy necessarily expended in the absence of a stay, are not enough . . ."

As the court below recognized (Pet. A 47a-48a; 17a-20a; 53a-55a), improvidence here in issuing the temporary restraint was in no way related to validity or invalidity of the Commission's order of cancellation and the remedy of restitution cannot be said to be dependent upon an adjudication of the merits of the complaint. Nor are petitioners aided in their contention that an adjudication on the merits is indispensable, by the contrary position they strongly advocated below. Their motion to dismiss without prejudice was unaccompanied by an alternative prayer for adjudication on the merits (Appendix A, this brief). They urged "the legality or illegality of the Commission order in Docket M-17459 is now academic. Judicial review of that order will accomplish nothing" (affidavit annexed to motion papers, p. 12). And again, "nothing can now be gained by a review of the Commission action . . . the issues herein are moot—these proceedings should be discontinued" (affidavit, p. 13). The case is clearly within the rule enunciated in *Arkadelphia* and *Ex Parte Lincoln Gas,* as fully discussed in the opinion of the court. (Pet. A 21a-26a).

2. To contend, as do petitioners, that an award of restitution may not be had without a Commission determination that the rates at issue were unjust and unreasonable when paid—that is, that a reparation suit must be prosecuted by the shippers before they can be made whole for wrongful restraint of the Commission's order—is to defeat the remedy of restitution. This was certainly true as to motor carriers regulated under Part II of the Act prior to Sep-

tember 5, 1965, when the statute lacked a reparation provision. Under the doctrine of *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), the Commission was powerless either to make a reparation award or to make an administrative determination that rates were unjust and unreasonable in the past. Under petitioners' theory, restitution would indeed have been precluded under the Interstate Commerce Act, at least with respect to motor carriers. What would have been true as a matter of law prior to 1965 would be true as a matter of empirical fact today. The motor carrier part of the Interstate Commerce Act includes a reparation provision (49 U.S.C. § 304a). Unlike § 16 of the railroad part which provides for a reparation complaint to be filed directly with the Commission, § 304a introduces a complex procedure that necessitates the institution of a suit in court first, followed by either a reference to the Commission or the filing of a Commission complaint. Needless to say, only reparation complaints of substantial monetary dimensions can survive a litigation prospect such as this. The Commission's effort to introduce an expeditious and economical procedure for small shipment claims was thwarted by motor carrier objections in a court suit and in the end given up by the Commission. *National Motor Freight Traffic Association* v. *United States*, 268 F. Supp. 90 (1967); *Informal Procedure, Motor Carrier Reparation*, 335 I.C.C. 403 (1969). The practical impediments to a reparation suit were noted by the court below (Pet. A 42a):

> "It is reasonably certain that many members of the general shipping public, who ultimately bore the burden of the higher rates in force by virtue of the temporary restraining order, will be unable for practical reasons to recover these charges."

See also *Ex Parte Lincoln Gas,* 256 U.S. 512 at 517. But the harm done the regulatory purpose would far exceed the monetary cost to shippers, deterred from undertaking reparation proceedings in order to enforce restitutional recovery. This goes to the core of the regulatory process in its interaction with judicial review. It is articulated by Professor Jaffe* as concern that appeals to the courts to review agency action "are not to become attractive as mechanisms to gain time." He adds: "although the bond and ancillary equitable restoratives may serve in many cases to neutralize whatever advantage may be gained from delay." Petitioners' theory would make possible exploitation of the processes of judicial review for the purpose of gaining time and when that end has been achieved, repudiation of the "equitable restoratives" that serve as its price—injunction bond and restitution. The court below saw this. It said (Pet. A 42a):

> "To require the reparation remedy would result in depriving the shippers of just those protections in the ratemaking process which the Supreme Court found so important in the *T.I.M.E.* case. Here the shippers have successfully challenged the carriers' rates in the administrative proceeding. In the course of that proceeding, they had to pay the higher rates which were ultimately ordered canceled for over 18 months. The carriers failed to comply with the Commission's order. To hold that the shippers have no remedy for this failure of compliance, except to litigate the whole issue all over again, would make a mockery of the statutory process for challenging carrier-made rates."

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* L. L. Jaffe—Judicial Control of Administrative Action, p. 694.

Section 216(g) of the Act places the burden of proof on the carrier to show that the proposed changed rate is just and reasonable. Failure to discharge that burden results, as in this case, in a Commission order to cancel the unjustified rate. Section 216(g) thus stands as the statutory bulwark between the carrier's reach and the shipper's purse. But, this can be true only if restitution is permitted to function as the equitable restorative of damages sustained by wrongful restraint of the Commission's order. Under petitioners' theory, restitution would vanish from the regulatory scene.

In an opinion notable for its analysis of the facts and for its exploration of the law of restitution, the Court of Appeals reached the conclusion that the remedy of restitution is appropriate to the facts and dictated by the law in this case. The petition states no ground or reason to warrant review by this Court on certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 16, 1971

APPENDIX A

Motion to Dismiss Complaint

IN THE

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

4-65, Civil 285

MIDDLEWEST MOTOR FREIGHT BUREAU *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

and

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, *et al.*,

Intervenors.

To the Court Above Named:

Plaintiffs respectfully move the court above named for an order dismissing the complaint without prejudice on the grounds that:

1. The issues raised in the complaint have now been rendered moot;

2. It is immaterial at the present time whether the Commission order under attack in these proceedings is found to have been valid or invalid;

3. Dissolution of the temporary restraining order herein, and the denial of further injunctive relief required plaintiffs to cancel those rates which were the subject matter of the Commission's order under attack;

4. Plaintiffs, thereafter, pursued the remedy suggested by this court in its findings of fact VII(b) in filing and pursuing before the Interstate Commerce Commission new and substituted increased rates, which rates, initially established on November 16, 1965, produced greater revenues than did the rates which plaintiffs sought to protect through the complaint action. The rates were further increased on December 19, 1966;

5. No justiciable matters remain at issue between plaintiffs and defendants;

6. Any justiciable issues raised by the complaint and the answer by intervenors have been resolved through subsequent administrative action;

7. Some, but not all, of the intervenors sought and were denied reparations for the alleged excess charges collected during the period of the temporary restraining order in subsequent administrative proceedings;

8. No legal issues remain for determination and disposition by this court. The foregoing motion is brought pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and is based upon all the files, records, and

proceedings herein and upon the affidavit of J. D. Lawson, together with exhibits appended thereto, which is made a part hereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1355

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 433 F. 2d 212. The orders of the district court (Pet. App. 61a-68a, 69a-73a; App., *infra*, pp. 14-19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1970. A petition for rehearing was de-

nied on November 16, 1970. The petition for a writ of certiorari was filed on February 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon dissolution of a temporary restraining order entered in a suit by truckers to set aside an order of the Interstate Commerce Commission rejecting their proposed rate increases and dismissal of the suit, shippers may recover the excess charges paid as a result of the temporary restraining order.

STATUTES INVOLVED

Sections 316 (b), (d), (e) and (g) of the Interstate Commerce Act (49 U.S.C. 316) are set forth at Pet. App. 106a-109a. Subsection (j) of that section provides:

> Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

STATEMENT

This suit was originally brought by interstate trucking carriers to set aside an order of the Interstate Commerce Commission disallowing certain rate increases. The shippers and the United States were also defendants.[1] A single-judge district court issued a temporary

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[1] The United States was a party to this case in two capacities. Since this suit was brought by the carriers against the Interstate Commerce Commission, the United States was a statutory defendant. Additionally, the United States intervened as a shipper. In the

restraining order enjoining the enforcement of the Commission's order pending a judicial hearing on a preliminary injunction before a three-judge district court. After the hearing, the three-judge court found that enforcement of the Commission's order should not be preliminarily enjoined and dissolved the temporary restraining order.

During the 17 days the temporary restraining order was in effect, the carriers charged the shippers the higher rates ordered cancelled by the Commission. The United States and the other shippers counterclaimed in the district court for recovery of the excess monies paid. The district court denied the counterclaims when the carriers' complaint was dismissed on the carriers' motion on the ground of mootness by reason of a new rate increase filed by the carriers and allowed to become effective. On appeal from the denial of the counterclaims, the court of appeals reversed, holding that the shippers were entitled to recover the excess rates paid as a result of the temporary restraining order.

1. *The Commission's cancellation order.* In 1963, the carriers published a tariff of increased trucking rates. The Commission ordered that the lawfulness of the proposed rates be investigated; it initially also suspended the new rates pending the investigation, but shortly thereafter permitted the new rates to go into effect during the investigation (Pet. App. 4a).

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present proceedings before this Court, the United States is involved only in its capacity as shipper.

After investigation, the Commission in February 1965 found that the carriers had not shown, as required by 49 U.S.C. 316(g), that the proposed increases were "just and reasonable" (Pet. App. 74a-100a), and ordered their cancellation (Pet. App. 96a). After granting several stays, the Commission set the effective date of this cancellation order as September 13, 1965 (Pet. App. 4a).

2. *The temporary restraining order.* On September 9, 1965, the carriers brought this suit in the District Court for the District of Minnesota to enjoin enforcement of the cancellation order (Pet. App. 5a). Judge Nordbye issued a temporary restraining order conditioned upon a $300,000 bond, pending a hearing before a three-judge court on whether a preliminary injunction should be issued (Pet. App. 5a, 62a-63a).[2] The private shippers, subsequently joined by the United States, intervened as defendants.

On September 24, 1965, the three-judge district court held a hearing on the carriers' motion for a preliminary injunction. After argument, the court orally denied the motion and stated that the temporary restraining order would be dissolved (Pet. App. 63a, 5a), but upon the carriers' request delayed until September 29 the entry of the formal order denying a preliminary injunction and dissolving the temporary restraining order (Pet. App. 5a, 63a). The three-judge court found that "plaintiffs have failed to convincingly demon-

[2] Under 28 U.S.C. 2325, a request for injunctive relief restraining the enforcement of an order of the Interstate Commerce Commission must be determined by a three-judge court.

strate that there is any basis for concluding that there is a reasonable probability that this Court will overrule the Commission's order in its finding that the proposed rate increases are not shown to be just and reasonable" (App., *infra*, pp. 18-19).[3]

3. *The shippers' counterclaims.* The temporary restraining order had been in effect for 17 days (September 13 through September 29, 1965), during which time the carriers had been collecting charges in excess of those permitted by the Commission's cancellation order. The private shippers, later joined by the United States, filed counterclaims against the carriers for refund of the excess charges collected while the temporary restraining order was in effect. The private shippers estimated that the overcharges to them amounted to $70,000 per day for each of the 17 days, while the United States estimated it overpaid a total of at least $50,000 (Pet. App. 2a; affidavit of Collan attached to United States memorandum in support of leave to file counterclaim).

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[3] The carriers under the Interstate Commerce Act can only charge those rates contained in their published tariffs. 49 U.S.C. 317. Following the district court's ruling, the carriers made an immediate *ex parte* application to the Commission for time to publish tariffs to comply with the order of cancellation. On September 30, 1965, without changing the requirements of its prior order that the carriers cancel the rate increase, the Commission ordered that the carriers would have until October 11, 1965, to publish tariffs in compliance with the order of cancellation. The Commission also authorized the carriers to reestablish the rate that had been in effect prior to the challenged rates on one day's notice instead of the usual 30 days' notice. On October 11, 1965, the carriers published lower rates to comply with the Commission's order (Pet. App. 6a, 111a-112a).

4. *Dismissal of the complaint and the counterclaims.* Meanwhile, the carriers pursued an alternative course to obtain relief from the Commission's cancellation order—a course of action which had the effect of making their attack on that order moot. Under Commission practice, carriers, to set new rates, merely have to publish and file a new rate schedule with the Commission and give appropriate notice. The rates so filed automatically become effective unless the Commission suspends them. 49 U.S.C. 316(b), (g). See Pet. App. 70a-71a. If the rates are challenged, the carriers may create a new record to justify them. The carriers invoked this procedure and published new rates, effective November 16, 1965 (Pet. App. 6a). These rates—which were higher than the rates which had been cancelled by the Commission—were ordered investigated, but were not suspended by the Commission [4] and thus superseded the 1963 rates which were the subject of the Commission's cancellation order (Pet. App. 6a and n. 3).

The carriers then moved in the district court for dismissal of both their complaint attacking the Commission's cancellation order and the shippers' counterclaims, on the ground of mootness (Pet. App. 7a). The three-judge district court granted the motion and dismissed both the complaint and the counterclaims as moot, since the rates cancelled by the Commission's order had been superseded by new rates. With respect

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[4] New material, not before the Commission when it considered the 1963 increases, was submitted by the carriers to justify this increase of November 16, 1965. Supplemental Appendix in the court of appeals, pp. 17-20.

to the counterclaims, the district court reasoned that in light of the Commission's subsequently permitting larger rate increases to take effect than those subject to the cancellation order, it would be inequitable to make the carriers repay the shippers the difference between the higher rates charged from September 13 through 29, 1965, and the lower, pre-existing rates which would have been in effect had the Commission's order not been stayed by the district court [5] (Pet. App. 61a-68a, 69a-73a).

5. *The decision of the court of appeals.* The United States and the private shippers appealed from the district court's dismissal of the counterclaims.[6] In an extensive opinion reversing the district court, the court of appeals held that the United States and the private shippers were entitled to recover the excess charges made during the period of the temporary restraining

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[5] The district court decision is contained in two orders (Pet. App. 61a-68a, 69a-73a). Initially, on September 5, 1968, the district court denied the shippers' counterclaims on the ground that certain administrative action taken by the Commission on September 30, 1965 (see fn. 3, *supra*) was intended by the Commission *retroactively* to stay the effective date of its order from September 13, 1965, when it was otherwise scheduled to go into effect, until October 11, 1965. Upon timely motion of the shippers to amend the findings, and after submission of a statement by the Commission (Pet. App. 69a-71a) explaining that its September 30, 1965, ruling did not have a retroactive effect, the district court on April 9, 1969, modified its earlier order to omit reliance upon the retroactivity of the Commission's ruling.

[6] The private shippers also filed a direct appeal to this Court, which was dismissed for want of jurisdiction. *National Small Shipments Traffic Conference, Inc.* v. *Middlewest Motor Freight Bureau*, 396 U.S. 111.

order, and remanded the case for further proceedings on the counterclaims (Pet. App. 1a-60a).

The court of appeals noted that the effect of the Commission's order was to terminate the increased rates as of the effective date of the order (September 13, 1965), so that the immediately prior lower rates should have gone into effect on that date. The temporary restraining order issued by the district court, however, prevented the Commission's order from taking effect until after September 29, 1965, when the restraining order was dissolved. The court of appeals observed that in those circumstances, the district court had the duty to provide restitution to a party damaged by the issuance of the temporary injunction.

ARGUMENT

The court of appeals correctly weighed the equities in this complex proceeding and determined, in accordance with the principles articulated by this Court in *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, and *Ex parte Lincoln Gas Co.*, 256 U.S. 512, that the carriers owed a duty of restitution to the shippers for excess rates collected as a result of the temporary restraining order. There is no occasion for review of that decision, which rests in large part upon the facts of this particular case.

1. This Court has long recognized that "[i]t is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to [control] that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St.*

Louis S.W. Ry. Co., supra, 249 U.S. at 145-146. In *Arkadelphia,* a carrier obtained a judicial order enjoining, pending a final court determination on the merits, lower freight rates set by a state agency. While the restraining order was in effect, the carrier charged shippers rates higher than those set by the rate order. Subsequently, the courts dismissed without prejudice for failure of proof the attack on the rate order and dissolved the injunction. Shippers who had paid the higher rates while the court's injunction was in effect sought a refund of the excess monies paid during the period. Finding restitution appropriate under the circumstances, this Court observed that when the carriers failed to sustain the validity of their rates, "they at the same time showed that the injunctions ought not to have been allowed." 249 U.S. at 144. The shippers were eligible for a refund under the principle "long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he lost thereby." 249 U.S. at 145.

In *Ex parte Lincoln Gas Co.,* 256 U.S. 512, this Court further elaborated on the principles of *Arkadelphia.* That case, like *Arkadelphia,* involved an injunction against a decree establishing lower rates, which injunction was eventually dissolved when the lower rates were sustained. This Court, again approving restitution of charges paid in excess of those set by the enjoined decree, noted that "the restraining order and temporary injunction were [entered] for the very pur-

pose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; * * *." 256 U.S. at 517 (emphasis added). See also *Public Service Commission* v. *Brashear Freight Lines,* 312 U.S. 621; *Baltimore & Ohio Railroad Company* v. *United States,* 279 U.S. 781, 785-786; *Inland Steel Co.* v. *United States,* 306 U.S. 153, 159.

In short, it is well settled that when a carrier invokes the process of a court to enjoin lower rates, and the court's temporary injunction is subsequently dissolved, the carrier has an "equitable duty" to refund to shippers the excess rates collected as a result of the court's process.

2. Petitioners (Pet. 9-16) assert that the principles of *Arkadelphia* are inapplicable where, as here, there has not been a judicial determination on the merits that the cancellation order of the Interstate Commerce Commission was valid. But contrary to the underlying assumption of this argument that an administrative order is not valid until upheld by a court, such an order is presumed valid until there has been a judicial determination to the contrary. *E.g., Interstate Commerce Commission* v. *City of Jersey City,* 322 U.S. 503, 512; *Ex parte Lincoln Gas Co., supra,* 256 U.S. at 518. "[T]he Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity." *Federal Power Commission* v. *Hope National Gas Co.,* 320 U.S. 591, 602.

The court of appeals correctly ruled (Pet. App. 10a)

that the lawfulness of the Commission's order cancelling the 1963 rate increases was not in issue in the proceedings on restitution. The question of the validity of those increases was rendered moot by the subsequent adoption of higher rates and the dispute over restitution involved only private parties and the United States as a shipper. In view of the complexity of the issues surrounding the Commission's cancellation order and the absence of the Commission as an interested party once the dispute over the actual rates to be charged in the future was terminated, it would have been inappropriate for the lower courts to have entertained direct attacks on the cancellation order in resolving the peripheral restitution dispute.

While the merits of the Commission's order have thus not been subjected to plenary review, the three-judge court did determine, subsequent to the issuance of the temporary restraining order, that there was not a substantial likelihood of the carriers prevailing on the merits (App., *infra,* pp. 18-19). Had the single-judge district court so recognized, it would not have issued the temporary restraining order. See, *i.e., Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 259 F.2d 921, 925 (C.A.D.C.).

3. Petitioners also assert that no restitution can be ordered because the Commission has not determined that the 1963 rates were unjust and unreasonable or exceeded maximum reasonable rates during the period the temporary restraining order was in effect; the measure of damages resulting from the temporary restraining order, petitioners contend, is therefore un-

known (Pet. 16-24). This argument, however, overlooks the fact that once the Commission had found in its February 1965 cancellation order that the carriers had failed to meet their burden of proving under 49 U.S.C. 316(g) that the 1963 increased rates were "just and reasonable," then from the effective date of that order, set by the Commission as September 13, 1965, it was unlawful for the carriers to charge such increased rates.[7] For the Act (49 U.S.C. 316(b) and (d)) imposes upon the carriers the duty to charge only just and reasonable rates.

Consequently, had petitioners not obtained the temporary restraining order from the district court, the carriers after September 13, 1965, could not have lawfully charged the rates set in the 1963 rate increase. And, they could not lawfully charge the rates set by their 1965 rate increase until its effective date, November 13, 1965. Thus, the temporary restraining order permitted them to charge for the 17 days from September 13 to September 29 rates which, but for the temporary restraining order, they could not lawfully have charged. Upon dissolution of the temporary restraining order, equity requires that the shippers be reimbursed for the extra charges above the preexisting rates which they had to pay because of the temporary restraining order. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Railroad Company, supra; Inland Steel Co.* v. *United States, supra; Ex parte Lincoln Gas Co., supra.*[8]

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[7] This case does not present the issue whether the Commission's determination meant that it was also unlawful for the carriers to keep the revenue from the increased rates charged by the carriers prior to the Commission's ruling. See Pet. App. 14a-15a.

[8] The carriers rely on *Atlantic Coast Line Railroad Company,*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys.

APRIL 1971.

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v. *Florida,* 295 U.S. 301, 302, where a claim for restitution by shippers was denied. In that case, the Commission had found existing rates charged by a railroad to be so low as to be discriminatory and had ordered an *increase.* The rate increase went into effect following the Commission's order after a district court had refused to invalidate the order. The Commission's order, however, was subsequently set aside by this Court on the ground the Commission had failed to make appropriate findings. Following this Court's decision, the Commission reopened its proceeding, made proper findings, and again found that the existing rates were discriminatory. The Commission's order this time was upheld. The shippers meanwhile filed a restitution suit to recover the difference between the lower rates and the higher rates charged in the period between the first Commission order and its reversal by this Court. This Court held that in equity and good conscience the shippers should not be permitted restitution. The Court pointed out that the carriers had merely been charging the increased rates in obedience to a Commission order. 295 U.S. at 311. Furthermore, the second Commission decision "had cured the defects in the form of its earlier decision." *Id.* This Court observed that to allow restitution would be to enforce rates which had been found to be discriminatory, 295 U.S. at 311-312, and were less than compensatory. 295 U.S. at 313. None of these equitable factors leading to a denial of restitution is present in the instant case.

APPENDIX

Order of September 29, 1965

In the
United States District Court
For the District of Minnesota
Fourth Division

4-65 Civ. 285

Middlewest Motor Freight Bureau, et al., Plaintiffs, vs. United States of America and Interstate Commerce Commission, Defendants, and The National Small Shipments Traffic Conference, Inc., et al., Intervenors, and Wisconsin Manufacturers Association, Intervenors.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR TEMPORARY INJUNCTION

This cause came on for hearing before this three-judge Court on September 24, 1965, upon motion by plaintiffs for an interlocutory injunction. Plaintiffs appeared by Harold C. Evarts, Esq., George D. Michalson, Esq., and Roland Rice, Esq. Defendants appeared by Sidney P. Abramson and Neil F. Convery, Assistant United States Attorneys for the District of Minnesota. The Interstate Commerce Commission appeared by Robert S. Grisvold, Esq. Intervenors Wisconsin Manufacturers Association appeared by Philip H. Porter,

Esq. All other intervenors appeared by John J. C. Martin, Esq., Larry R. Henneman, Esq., and Michael P. Sullivan, Esq.

The Court having heard the arguments of counsel, having considered the affidavits submitted, on all the files, records and proceedings herein makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

This is a proceeding to review the determination of the Interstate Commerce Commission (hereinafter referred to as "The Commission") in the proceeding designated as I and S Docket M-17450, *LTL Class Rates & Minimum Charges Between Midwest and Central Territories,* wherein the Commission determined that certain schedules for increases in less-than-truckload class rates and minimum charges filed with the Commission were "not shown to be just and reasonable." Those schedules established increased rates and charges on class-rated, less-than-truckload shipments between, to, and from points in Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming. By stipulation of the parties concerned, the Commission's order also embraces such rates and charges on shipments moving between Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin on the one hand, and Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee,

and Texas on the other hand. Such schedules became effective on July 1, 1963. By Order of the Commission, Board of Suspension dated June 26, 1963, such schedules were suspended. By Order of the Commission dated August 8, 1963, the said order dated June 26, 1963, was vacated and set aside as of September 7, 1963. By report and order dated February 24, 1965, the Commission ordered the scheduled increases to be cancelled finding "that the proposed increases are not shown to be just and reasonable." By subsequent orders the Commission postponed the date for compliance with the report and order of February 24, 1965, to September 13, 1965.

II

The Middlewest Motor Freight Bureau is a corporation organized under the laws of the State of Missouri and is a trade association and tariff publishing agent for some 1,200 motor common carrier members including the motor carrier plaintiffs herein.

III

On September 9, 1965, the United States District Court for the District of Minnesota made its temporary restraining order restraining and enjoining the Interstate Commerce Commission from enforcing its said order of February 24, 1965, and thereafter modified by subsequent orders, and suspending the operation of said order of February 24, 1965. On September 20, 1965, after noticed hearing on September 16 and 17, 1965, said Court made its order extending said tem-

porary restraining order pending a determination of plaintiffs' motion for interlocutory injunction.

IV

On September 24, 1965, this three-judge Court heard and considered the arguments of counsel relative to plaintiffs' motion for an interlocutory injunction.

V

Plaintiffs contend that the report and order of the Commission dated February 24, 1965, is unlawful on various grounds, such as being unsupported by the evidence, arbitrary, capricious, and an abuse of discretion, and that the Commission's findings represented an ex post facto application of revised standards as to the nature of the evidence required to justify the rate increases, but the plaintiffs primarily urge that their showing before the Commission justified a finding that, without the proposed increase, the operating ratio of many, if not most, of the carriers involved, would exceed 93 per cent, which the Commission had theretofore found to be reasonable.

VI

The Commission found that the evidence before it submitted by the carrier plaintiffs was of little probative value to support the proposed operating rates submitted to it, and on the hearing before this Court on the motion for an interlocutory injunction, this Court finds that the plaintiffs have failed to establish by any persuasive showing that the Commission had done any-

thing more in applying new standards to the record submitted, than to scrutinize with greater care the surveys which the carriers had promulgated in support of the proposed increased rates.

VII

This Court further finds on the showing before it

(a) That plaintiffs had reasonable notice of the alleged new standards which the Commission allegedly promulgated and which pertained to the degree of proof necessary to sustain the surveys made by the carriers in support of the proposed increase of rates.

(b) That plaintiff carriers involved herein have adequate administrative remedies which will enable them to proceed with proposed new increased rates already filed with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates.

(c) That the balancing of the equities in considering the magnitude of the losses and injury to the public if the interlocutory injunction is granted and if the Commission's order is sustained by the Court, as compared with the losses to the carriers if the injunction is not granted, with the remote possibility of the Commission's order being set aside, adequately justifies this Court, on this showing, in denying the motion for an interlocutory injunction.

(d) That plaintiffs have failed to convincingly

demonstrate that there is any basis for concluding that there is a reasonable probability that this Court will overrule the Commission's order in its finding that the proposed rate increases are not shown to be just and reasonable.

CONCLUSIONS OF LAW

1

The plaintiffs are not entitled to an interlocutory injunction, and plaintiffs' motion therefor should be and hereby is denied.

2

The temporary restraining order herein dated September 9, 1965, as extended by order dated September 20, 1965, should be and hereby is dissolved.

Dated this 29 day of September, 1965.

HARRY A. BLACKMUN
Harry A. Blackmun
United States Circuit Judge

EDWARD J. DEVITT
Edward J. Devitt
United States District Judge

GUNNNAR H. NORDBYE
Gunnar H. Nordbye
United States District Judge

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1355

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA AND NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

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May 3, 1971

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

Two briefs in opposition to our Petition for a Writ of Certiorari have been filed, one by the United States in its capacity as a shipper and the other by various organizations of shippers. Since the arguments in the briefs are different, and to some extent inconsistent, we reply separately to each.

A JUDICIAL DECISION ON THE MERITS OF THE COMMISSION'S ORDER IS NECESSARY

The Argument of the United States

The United States argues that "it is well settled that when a carrier invokes the process of a court to enjoin lower rates, and the court's temporary injunction is subsequently dissolved, the carrier has an 'equitable duty' to refund to shippers the excess rates collected as a result of the court's process." (Br. p. 10) This is of course an incorrect statement of the law, as is clear from the language of this Court in *Arkadelphia Milling Co.* v. *St. Louis S.W. Railway Co.*, 249 U.S. 134, 145 (1919), which the United States quotes and on which it relies. This Court there held "that a party against whom an *erroneous* judgment or decree has been carried into effect is entitled, *in the event of a reversal,* to be restored by his adversary to that which he lost thereby." (Br. p. 9; emphasis supplied) As the Court of Appeals said in this very case, the dissolution of a temporary restraining order gives rise to a right to restitution only "in the absence of a later decision in the carriers' favor on the merits" of the order of the Interstate Commerce Commission. (Pet. Ap. 58a) In other words, there is no right to restitution if the temporary restraint of the Commission's order was not improvidently granted and the temporary restraint was not improvidently granted if that order was invalid.

The United States concedes that in *Arkadelphia* there was, whereas here there was not, a judicial determination that the order temporarily restrained was valid. (Br. p. 10) Nevertheless, it says that such a determination is unnecessary. First, it says that an order of an administrative agency "is presumed valid

until there has been a judicial determination to the contrary." (Br. p. 10) Petitioners agree. But as the cases the United States cites make clear, the presumption means no more than that one challenging the validity of an order of an administrative agency has the burden of proof. If, as the Court of Appeals held, the counterclaims for restitution should not have been dismissed, Petitioners have the right to try to carry that burden.

Second, the United States says that the question of the validity of the Commission's order "was rendered moot by the subsequent adoption of higher rates. . . ." (Br. p. 11) The action of the Commission permitting the carriers to subsequently make effective rates higher than those it had ordered canceled of course rendered moot the carriers' suit to enjoin the order of cancellation. But it obviously did not render moot the shippers' counterclaims for restitution of monies collected by virtue of the temporary restraint. Equally obviously, since the right to restitution exists only if the Commission's order was valid, the issue of its validity is not moot. As the District Court properly said, if the counterclaims and the admitted facts in support of them gave rise to a right to restitution, as the Court of Appeals held, the resolution of the issue of the validity of the Commission's order is necessary. (Pet. App., pp. 65a-66a)

Third, the United States says that "it would have been inappropriate for the lower courts to have entertained direct attacks on the cancellation order in resolving the peripheral restitution dispute" because the issues on the validity of that order were complex, the dispute involved only private parties and the United States as a shipper, and the Commission was absent "as an interested party once the dispute over the ac-

tual rates to be charged in the future was terminated." (Br. p. 11) This is a startling and wholly untenable proposition. No court will refuse to resolve an issue, the resolution of which is necessary to the entry of a judgment establishing liability, on the ground that the issue is complex. Much less may a court assume, as did the Court of Appeals here, that were the issue resolved the result would be a judgment establishing liability. As for the absence of the Commission as an interested party in the shippers' suit on their counterclaims for restitution, it was a party to the carriers' suit for an injunction and manifestly both capable and free to rise in defense of its order. Moreover, the statutory defendant charged with the duty to defend the order of its agency is the U.S. Government itself —not the Interstate Commerce Commission.

Finally, the United States says that the interlocutory injunction against the Commission's order of cancellation was denied because the three-judge District Court found that there was not a substantial likelihood that the carriers would prevail on the merits. The simple answer is that this finding falls far short of a finding that the Commission's order was valid, which finding is an initial prerequisite to an award of restitution.[1] Moreover, the United States ignores the fact that this

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[1] We note in passing that a subsequent ICC decision which relied upon the order in issue here was considered in *Ringsby Truck Lines, Inc., et al.* v. *United States,* 263 F. Supp. 552 (1967), appeal dismissed *per curiam, sub nom. National Small Shipments Traffic Conference, et al.* v. *Ringsby Truck Lines, Inc., et al.,* 389 U.S. 576 (1968). There a three-judge District Court for the District of Colorado permanently enjoined an order of the Interstate Commerce Commission directing the cancellation of increases in rates on substantially the same grounds as Petitioners urged in the case at bar.

was only one of five findings of the District Court on which it denied the interlocutory injunction. The Court was faced with the carriers' contention that they needed still higher rates due to the passage of time from 1963 to 1965, during the Commission investigation, and the shippers' contention that irreparable damage would not result if the carriers could justify higher rates to the Commission. The Court, upon weighing the potential damage, concluded that if the carriers' claim were correct, they had an adequate administrative remedy. The fact that the ICC did allow higher rates then led the court to conclude that no damage had accrued to the shippers, thus making unnecessary a determination of the validity or invalidity of the Commission order.

The Argument of the Private Shippers

The shippers argue that "the remedy of restitution cannot be said to be dependent upon an adjudication of the merits of" the Commission's order.[2] (Br. p. 14) They rely on the fact that in both *Arkadelphia, supra,* and *Ex Parte Lincoln Gas & Electric Co.,* 256 U.S. 512 (1921), this Court reversed decrees granting permanent injunctions and ordered the suits dismissed without prejudice. They argue that because the dismissals were without prejudice "there was no final adjudication" of the validity of the orders restrained by the District Court in those cases. (Br. p. 12) As we have seen, the United States makes no such argument, and no such argument can be tenably made. As the Court of Appeals itself pointed out, quoting *Arkadel-*

[2] In their Jurisdictional Statement in *National Small Shipments Traffic Conference, et al.* v. *Middlewest Motor Freight Bureau, et al.,* dismissed, 396 U.S. 111, these parties argued to the contrary.

phia, this Court held that the reversals without prejudice "did not deprive the decrees of conclusiveness as to past transactions, but only prevented them from being a bar to future suits for injunction upon a showing of changed conditions." 249 U.S. at 147 (Pet. App. 23a)

The shippers also rely on *Bell* v. *United States,* 49 F. Supp. 505 (E.D. La. 1943). In that case the District Court had permanently enjoined an order of the Interstate Commerce Commission forbidding railroads to pay allowances to a shipper. Upon reversal by this Court the railroads sought restitution of the monies paid the shipper by virtue of the injunction. One of the defenses of the shipper was that, at its instance, the Commission had re-opened the case, reconsidered its order and held the allowances lawful. The District Court rejected the defense on the ground that "the Commission's report on rehearing clearly shows that the Commission based its conclusion not on the theory that [its] original order . . . was wrong, but on the belief that the case presented by the record made upon rehearing was different from the case originally presented." In other words, the subsequent action of the Commission, taken in the light of what the Court called "changed circumstances and conditions" shown by the shipper in its petition for reopening and reconsideration, did not constitute a reversal of its first order and hence did not render the restraint of that order any the less improvident. 49 F. Supp. at 508.

The shippers further argue that the temporary restraint of the Commission's order of cancellation was improvidently granted because compliance with it would not have caused the carriers irreparable injury. This contention flies in the face of their argument

throughout this case and the holding of the Court of Appeals, namely, that but for the temporary restraint the carriers would have been required to perform transportation at lower rates than they in fact charged and collected. The result would have been an irrevocable loss of revenue because it is fundamental that carriers cannot increase their rates retroactively under any circumstances.

In any event, a temporary restraint was in fact granted. Whether or not the District Court should have granted it, i.e., whether it properly balanced the equities or gave appropriate weight to the factors discussed in *Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 259 F. 2d 921 (D.C. Cir. 1958), has no bearing on the right of the shippers to restitution. They have no right to restitution unless the temporary restraint of the Commission's order of cancellation permitted the carriers to charge unlawfully high rates. If, as the carriers have consistently contended the Commission's order was invalid, then it is the carriers which have been damaged and the shippers have never been required to pay rates above a reasonable level.

A DETERMINATION BY THE COMMISSION THAT THE INCREASED RATES EXCEEDED MAXIMUM REASONABLE RATES IS NECESSARY

The Argument of the United States

The United States argues that a determination by the Commission that the increased rates exceeded maximum reasonable rates is unnecessary because the Interstate Commerce Act "imposes on the carriers the duty to charge only just and reasonable rates," and the Commission found "that the carriers had failed to

meet their burden of proving . . . that . . . the increased rates were 'just and reasonable' . . ." (Br. p. 12) This argument begs the question. Of course the carriers are charged with the duty to maintain just and reasonable rates. However, only the Commission can determine what rates are just and reasonable. It made no such determination in this case. Hence, assuming *arguendo* that its order of cancellation was valid and therefore improvidently restrained, there must be a reference of the case to the Commission for a determination of the extent to which, if at all, the increased rates collected during the period of the restraint exceeded maximum just and reasonable rates. Absent such a determination the measure of damages, if any, is unknown and no award of restitution can be made.

The United States relies upon *Arkadelphia* supra, *Lincoln Gas* supra, and *Inland Steel Co.* v. *United States,* 306 U.S. 153 (1939). These cases are inapposite. In *Arkadelphia* and *Lincoln* specific rates were legislatively prescribed for future application. Higher rates were charged by virtue of the improvident judicial restraint of the orders of prescription. Hence, the measure of damages in restitution was clearly the difference between the prescribed rates and the higher rates actually charged. In *Inland Steel* an order of the Commission forbidding the railroads to pay allowance to shippers was temporarily restrained at the instance of the shippers on condition that the monies payable to them as allowances be segregated into a separate account and held by the railroads. Upon the affirmance of the Commission's order the amounts so segregated and held, which in the words of this Court, were "exactly known and undisputed," were ordered to be retained by the railroads. 306 U.S. at 161.

The Argument of the Private Shippers

The shippers argue that the petitioners seek to relegate them to individual suits for reparations under Section 204a of the Interstate Commerce Act (49 U.S.C. § 304a), which they claim are precluded "as a matter of empirical fact" because the procedure under Section 204a is complex and can be invoked only by individual shippers with individual claims of "substantial monetary dimensions." (Br. p. 15) Petitioners do not seek to relegate the shippers to individual suits for reparations. Nor are such suits necessary. Assuming *arguendo* that the Commission's order was valid and therefore improvidently restrained, there is no practical or legal impediment to the entry of an order by the District Court in this case referring to the Commission for determination the question of the extent to which, if at all, the rates the carriers charged during the period of the restraint exceeded just and reasonable rates.[3] Thereafter the District Court can enter such judgment on the claims for restitution as is appropriate in the light of the Commission's determination.

The shippers rely on *Accelerated Transport-Pony Express, Inc* v. *United States,* 227 F. Supp. 815 (D.C. Vt. 1964) aff'd *per curiam,* 379 U.S. 4 (1964), for the proposition "that courts have power to make restitution of freight charges collected under applicable tariffs independently of action by the Interstate Commerce Commission." (Br. p. 11) The case does not support

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[3] We note in passing that the Commission permitted rates higher than those it had ordered cancelled to take effect on November 16, 1965, only 49 days after the dissolution of the temporary restraint on September 29, 1965.

the proposition. The District Court there did not, as did the Court of Appeals here, determine the measure of damages in restitution independently of action by the Commission. On the contrary, the measure of damages in restitution was determined by the Commission in the very order the District Court held valid and therefore improvidently restrained. As the Court of Appeals noted, the Commission there found that rates for short hauls higher than rates for long hauls were unlawful—a finding not present in the case at bar—and ordered them cancelled *"to the extent of the discrepancy."* (Pet. App. 28a; emphasis supplied)

CONCLUSION

For all of the reasons set forth in our Petition for a Writ of Certiorari and herein we reiterate the prayer of our Petition, namely, that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and upon review of the record in that Court, reverse its judgment and remand the case to it with directions that it remand the case to the United States District Court for the District of Minnesota with directions to determine whether or not the order of the Interstate Commerce Commission requiring the cancellation of the increased rates at issue was valid, and, if it finds that it was, to refer the case to the Interstate Commerce Commission for a determination as to what rates were maximum reasonable rates

during the period of the temporary restraint of the Commission's order.

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No. 1355

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

MIDDLEWEST MOTOR FREIGHT BUREAU, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA and NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

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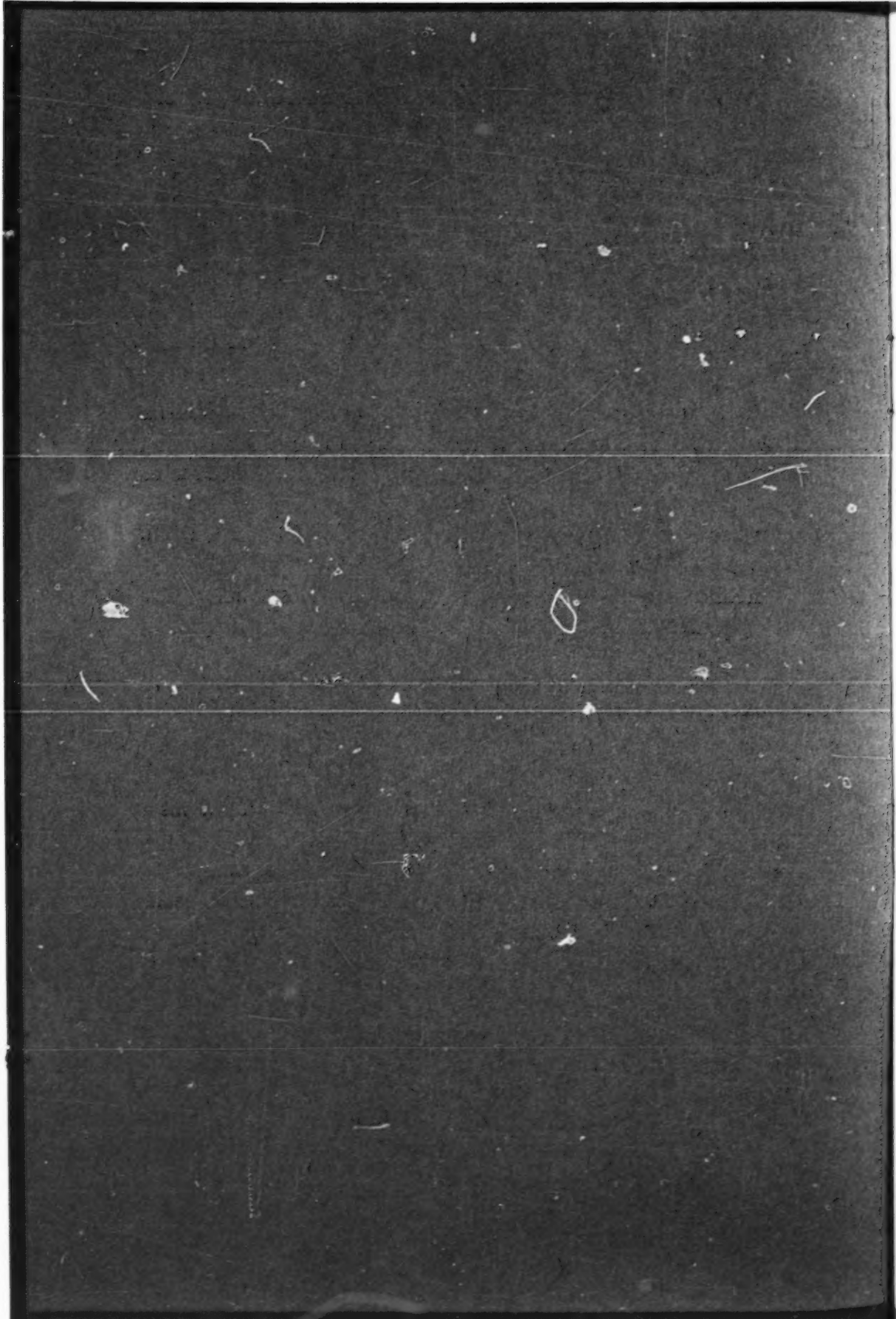

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This supplemental memorandum is submitted pursuant to Rule 24(5) to call to the Court's attention documentary matter that is dispositive of contentions raised by petitioners on reply brief.

Petitioners undertake to distinguish the *Accelerated Transport* case* by asserting the District Court did not there, as here, determine the measure of restitutional damages independently of the Commission. They say (Reply, p. 10):

* *Accelerated Transport-Pony Express, Inc.* v. *United States*. 227 F. Supp. 815 (D.C. Vt. 1964), aff'd per curiam, 379 U.S. 4 (1964).

> "On the contrary, the measure of damages in restitution was determined by the Commission in the very order the District Court held valid and therefore improvidently restrained."

Documentary material submitted by the carriers to the Commission in the *Accelerated* case demonstrates that petitioners have erroneously characterized to this Court the nature and effect of the Commission's order as including a determination of the measure of damages in restitution.

1. *The Commission's order in Accelerated left the maximum reasonable rates undetermined.* In *Accelerated* the Commission ordered the schedules cancelled to the extent found unlawful, without prejudice to their amendment so as to make applicable "lower rates to more distant points as maxima at intermediate border points" (319 I.C.C. 168 at 177). The lower rates to more distant points were not specified in the Commission's report or order. There were at least four variables, two with respect to time and two or more with respect to the particular more distant points that were to be held as maxima. That is, with respect to a haul to Pittsburgh, Pa., whether the maximum was to be the lower rate to Steubenville, Ohio, 37 miles from Pittsburgh, or Zanesville, 127 miles from Pittsburgh. The Steubenville rate, representing a shorter haul, was of course very much lower than the rate to Zanesville. It made a great difference whether Steubenville or Zanesville —or rates for any of the points between—become the standard of maximum reasonableness for the shorter haul to Pittsburgh. It was thus impossible to determine from the Commission's order just what the standard of maxi-

mum reasonableness was. The carriers themselves so declared in a petition filed with the Commission on May 25, 1964, seeking a determination that their tariffs were in compliance with the Commission's order. They said:

> "The order here sought is necessary because of the uncertainty as to the meaning of that decision and hence the uncertainty as to whether the tariffs being filed are in compliance with that order."

In a later section of their petition, captioned "The Uncertainty of the Decision and Order" they described as areas of variability with respect to the standard of maximum reasonable rates, the dates at which the rate disparities were to be measured and "the choice of points beyond." At page 6 they stated:

> "The question is to which more distant points? Respondents' tariffs to be effective June 26 do not fix as maximum rates at intermediate points the presently effective rates at the first more distant points beyond. For example, they do not fix as the maximum rates at Lynchburg, Virginia, the present rates to Gretna, Virginia, the next point beyond Lynchburg. Rather, they fix as maximum at Lynchburg the present rates to Reidsville, North Carolina."

The petition of the carriers is reproduced and folded into this brief as Exhibit A. The Commission's response to the carriers' petition for an order approving the carriers' choice of time and place in their tariffs, purportedly in compliance, was denial. The Commission at the same time denied a motion filed by the shippers to reject the tariffs.

There was thus left completely open and undetermined in June 1964 the question of what was the standard of maximum reasonable rates under the Commission's order of cancellation that was issued on March 20, 1963.

2. *The Court in Accelerated fixed the measure of restitutional recovery.* In 1965, proceedings were instituted under Rule 65(c) of the Federal Rules of Civil Procedure to assess damages flowing from restraint of the Commission's order. By order of December 22, 1965, the matter was referred to a Master to determine the amount of damages sustained. The carriers were required to file with the Master an account of monies collected in excess of charges that would have been applicable had the Commission's order not been restrained. Following the submission of an accounting, objected to by the shippers as inadequate, the carriers and shippers sought to arrive at agreement as to which of some five varying possibilities should be used as the basis for the restitutional award. After analysis by the parties of the respective formularies, a stipulation was entered into which referred to "the difficulty of determining which of many interterritorial rates shall be used as maxima and what intraterritorial movements shall be deemed subject to the maxima." The stipulation was signed by all the parties including representatives of the Interstate Commerce Commission, the United States, and the Department of Justice. It was approved by the District Judge on May 31, 1967 and became the basis for restitutional recovery. The case is discussed fully in the opinion below (Pet. A 28a-29a).

3. *The instant case involved long and short haul disparities.* At page 10 of their Reply, petitioners state:

> ". . . the Commission there found [in *Accelerated*] that rates for short hauls higher than rates for long hauls were unlawful—a finding not present in the case at bar . . ."

The Commission did in the case at bar include references to rate disparities of this sort. It found the existence of anomalous situations in rates higher for short than long hauls via the same carrier over the same route and directed their removal if the presumption of unreasonableness remained unrebutted, citing *Accelerated* (Pet. A 95a).

CONCLUSION

Respondents consider that it would usurp the office of supplemental brief to answer *seriatum* contentions of the petitioners in their reply brief. Respondents suggest that the answers are to be found in the opinion of the Court of Appeals. Particularly apt is the Court's discussion of the measure of restitutional recovery in this case (Pet. A 19a-20a). Fully considered are *Arkadelphia* and *Ex Parte Lincoln Gas* (Pet. A 21a-26a). The opinion supplies a complete answer to the contention that a Commission adjudication of rate reasonableness is a precondition to restitution (Pet. A 35a-44a). Petitioners' self-defeating argument that the merits of the complaint, which they moved for dismissal, remain to be adjudicated ("Literally, nothing was left for review"—brief to court below pp. 17-18) is conclusively answered (Pet. A 56a-58a). Effectively revealed in the opinion below are the contributions made

by the equitable remedy of restitution to stability of the ratemaking process; and the destruction that would be visited on the regulatory scheme by introduction of the conditions precedent contended for by the petitioners (Pet. A 40a-42a).

Respondents respectfully suggest that neither in petition nor reply have petitioners stated reasons that warrant review by this Court of the decision below. The petition for a writ of certiorari should be denied.

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May 12, 1971

BEFORE THE

1964 MAY 25 PM 1:04

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 33652

GENERAL INCREASE-MIDDLE ATLANTIC
AND NEW ENGLAND TERRITORIES

PETITION
FOR ORDER APPROVING TARIFFS

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 33652

GENERAL INCREASE-MIDDLE ATLANTIC
AND NEW ENGLAND TERRITORIES

PETITION
FOR ORDER APPROVING TARIFFS

Come now Respondents in this case whose tariffs are published by Middle Atlantic Conference and, pursuant to Section 1.102 of the General Rules of Practice, file this Petition for an Order Approving Tariffs filed simultaneously herewith. In support of this Petition Respondents say:

NEED FOR THE RELIEF SOUGHT

Division 2, by decision and order entered on March 20, 1963, found unlawful such of Respondents' increased rates under investigation "to intermediate points [within Middle Atlantic Territory as] are higher than the rates to more distant points [beyond that Territory] over the same routes." It therefore ordered such rates cancelled on or before May 10, 1963 "without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points." 319 I.C.C. 168 at 177. By subsequent orders the date for compliance with the order was extended to June 26, 1964. Accordingly, Middle Atlantic Conference, as publishing agent for

Respondents, is filing simultaneously herewith tariffs to be effective on June 26, 1964.[1/] Special permission to depart from the requirements of the Tariff Circular permitting the filing of those tariffs was granted (No. 30817-M). That application for special permission is appended hereto. It explains in detail and illustrates with a sample tariff how compliance is being effected.

By this Petition Respondents seek an order specifically finding that said tariffs are in compliance with the decision and order of March 20, 1963. The order here sought is necessary because of the uncertainty as to the meaning of that decision and hence the uncertainty as to whether the tariffs being filed are in compliance with that order. Unless the order here sought is issued Respondents will be in jeopardy of criminal and civil prosecution under Sections 222(a) and 222(b) of the Interstate Commerce Act for violation of the order of March 20, 1963. Moreover, they may be liable to shippers and receivers for damages should it be subsequently determined that the rates in the tariffs being filed are not in compliance with the decision and order of March 20, 1963 and that they produce higher charges than would be produced by rates in compliance with that decision and order.

1/ The decision and order of March 20, 1963 were affirmed by the United States District Court for the District of Vermont in Accelerated Transport-Pony Express, Inc., et al. v. United States and Interstate Commerce Commission, 227 F. Supp. 815 (1964). An appeal to the Supreme Court from that affirmance has been noted and will be pressed. Therefore the tariffs Respondents are filing carry an expiration date of November 1, 1964. If by that time the Supreme Court has affirmed the judgment of the District Court the expiration date will be removed. If the case is still pending and there has been no stay of the order of the Commission it will be extended. If the Court has stayed the order or reversed the judgment the tariffs will be cancelled or expire.

Respondents may be liable to shippers and receivers for damages notwithstanding that under T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959), a suit for reparations grounded on the unreasonableness of rates will not lie. The Court was there dealing with duly and properly filed rates. The question before it was whether an allegation that rates concededly legal under Section 217 of the Act are unlawful under Section 216 raises a justiciable question. The Court answered no, relying in large part on Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951).

The Court in T.I.M.E. did not reach the question whether there is a justiciable legal right to recover reparations grounded on rates not duly and properly filed. Compare Montana-Dakota, supra, in which Justice Frankfurter and three of his brethren dissented because, in their view, the plaintiff stated a cause of action cognizable in a federal court when it alleged that the rates were unlawfully established and unlawfully filed with the Federal Power Commission. The opinion of the majority of the Court did not categorically reject this view. Rather, it seems to say that the plaintiff had not clearly alleged a violation of the Federal Power Act or any rule or order of the Federal Power Commission. In any event, that the question is open under the Interstate Commerce Act and T.I.M.E. is clear from Lynchburg Traffic Bureau v. Smith's Transfer Corp., 285 F. 2d 743 (4th Cir. 1961).

The Lynchburg Case was a suit for reparations grounded on allegedly unreasonable rates filed with this Commission. The District Court dismissed the complaint on the authority of T.I.M.E. On appeal the plaintiff contended that its case was not controlled by T.I.M.E. because the defendant's rates had been established and filed in disobedience of an order of the Commission. The Court of Appeals said,

285 F. 2d at 744:

> "If, indeed, we could perceive in the earlier proceedings to which our attention has been called, (though they were not made a part of the record,) a plain order or orders of the Commission which had the effect of approving certain rates applicable to the shipments here in question, and the defendant's charges were in excess of such rates, the plaintiff might well have a case not falling within the T.I.M.E. ruling. We cannot so adjudicate on this record."

Accordingly, the Court of Appeals remanded the case to the District Court "to give the plaintiff an opportunity . . . to file an amended complaint alleging facts, if they exist, which might entitle it to relief." 285 F. 2d at 745.

THE UNCERTAINTY OF THE DECISION AND ORDER

Rates In Effect Before Increases

It cannot be gainsaid that there is uncertainty about the meaning of the decision and order of March 20, 1963. Does it require Respondents to adjust their rates in effect on January 15, 1961, the day before the increased rates in issue became effective, so as to eliminate border disparities or does it merely require them to cancel the increased rates in issue in the proceeding to the extent that they created disparities or worsened existing disparities? Respondents are of the view that the latter is all that the decision and order could or did so.

This case was, in the words of the decision, "an investigation instituted by order dated January 13, 1961, into the lawfulness of general increases . . . published to become effective on January 16, 1961, and later . . . ." 319 I.C.C. at 168. Section 216(g) of the Act, which confers authority to investigate proposed changed rates provides that "after hearing . . . the Commission may make such order . . . as would be proper

in a proceeding instituted after [the rates] had become effective," i.e., a proceeding under Section 216(e). Section 216(e) provides that, if after hearing in investigations of existing rates the Commission finds the rates unlawful, "it shall determine and prescribe the lawful" rates. Construing the comparable sections of Part I of the Act, the Supreme Court has held that in investigations of proposed changed rates the Commission has authority to modify not only the changed rates, but the pre-existing rates as well. Ayrshire Collieries Corp. v. United States, 335 U.S. 278 (1949).

Assuming arguendo that the holding in Ayrshire Collieries governs the reach of the Commission's authority under Section 216(g), that holding has no application here for two reasons. First, the Commission's decision and order of March 20, 1963 did not purport to modify Respondents' pre-existing rates. All the Commission's order required was the cancellation of the increased rates to the extent found unlawful. Second, in contrast to Ayrshire Collieries, there was no evidence of record to support either a finding that the rates in effect on January 15, 1961 were unlawful or a determination and prescription of rates in lieu thereof. And the Commission made neither such a finding nor such a determination and prescription.

Therefore, Respondents' tariffs filed in compliance with the order of March 20, 1963 provide that rates to intermediate points in Middle Atlantic Territory shall be either the rates to the points beyond or the rates in effect immediately prior to the rates at issue in this case, whichever are higher. Respondents ask the Commission to issue an order specifically finding that this is compliance with that order.

The Choice Of Points Beyond

The Commission's decision of March 20, 1963 found unlawful rates to intermediate points "higher than rates to more distant points." 319 I.C.C. at 177. The question is to which more distant points? Respondents' tariffs to be effective June 26 do not fix as maximum rates at intermediate points the presently effective rates at the first more distant points beyond. For example, they do not fix as the maximum rates at Lynchburg, Virginia the present rates to Gretna, Virginia, the next point beyond Lynchburg. Rather, they fix as maxima at Lynchburg the present rates to Reidsville, North Carolina.

Respondents support this method of compliance with the decision and order of March 20, 1963 on four grounds. First, neither that decision nor that order in terms require that the rates to an intermediate point be no higher than the rate to the first more distant point beyond.

Second, both Eastern Central Motor Carriers Association and Southern Motor Carriers Rate Conference have approved for publication a re-grouping of points immediately south and west of the borders of Middle Atlantic Territory. If the proposed re-groupings become effective the rates to the points beyond that Respondents have chosen as the points to which intermediate points are to be refined will be in fact the rates to the first points beyond.

Third, the points beyond selected as the points of reference for fixing maximum rates at intermediate points are the points beyond to or from which substantial volumes of traffic move.

Fourth, to fix as maxima at intermediate points the present rates to the first points beyond would result in a much greater loss of revenues - a loss that would further jeopardize Respondents' financial abaility to perform their duty to render adequate and efficient service. That their financial position is already precarious is shown by the Justification filed May 4, 1964 in support of the general increase in rates, effective May 15 and June 22 on class rates and July 1 on commodity rates. Despite Protests, the Commission refused to suspend the increases on class rates.

Respondents ask the Commission to issue an order specifically finding that this is compliance with its order of March 20, 1963.

The Grouping Of Intermediate Points

Just as it is necessary to determine what points beyond will be used as points of reference for fixing maximum rates at intermediate points, so it is necessary to determine what particular intermediate points are to be referred to each point beyond. For example, Petersburg, Virginia, on the southern border of Middle Atlantic Territory, is about the same distance west of Windsor, North Carolina as it is east of Rocky Mount, North Carolina, both of which are points of reference for fixing maximum rates at intermediate points. Is Petersburg to be referred to Windsor or Rocky Mount? Respondents have solved this problem in the following way. Windsor is between 76° and 77° West Longitude. Rocky Mount is between 77° and 78° West Longitude. Therefore, all intermediate points between 76° and 77° are referred to Windsor. All between 77° and 78° are referred to Rocky Mount. Petersburg being between 77° and 78° West Longitude, it is referred to Rocky Mount. The problem is solved in the same way at the western border, except that parallels of latitude

are used. For example, Zanesville and Akron, Ohio are both points of reference. All intermediate points between 40° and 40° 30' North Latitude are referred to Zanesville. All intermediate points between 40° 30' and 41° 30' are referred to Akron.

Complete Compliance

The result of Respondents' choice of points beyond will effect complete compliance with the decision and order of March 20, 1963 as to the western border of Middle Atlantic Territory if the re-grouping of points in Eastern Central Territory takes effect on June 26, 1964 as published. It will not effect complete compliance as to the southern border until the re-grouping of points in Southern Territory takes effect. That re-grouping is expected to be published to take effect on or about August 3, 1964.

The method of grouping intermediate points to particular points beyond will be complete compliance except in cases in which a particular carrier has a route of movement from an intermediate point to a point beyond other than the point beyond to which the intermediate point is referred. But it is obviously impossible to take account of every one of Respondents' multitudinous routes. To attempt to do so would destroy any semblance of a rate structure in Middle Atlantic Territory. Furthermore, as the sample tariff appended hereto as part of the application for special permission to depart from the requirements of the Tariff Circular shows, the reasonable method by which Respondents have chosen to comply with the order of March 20, 1963, results in a highly complex set of tariffs. Tariffs that would foreclose every possibility of a rate to an intermediate point higher than a rate to a point beyond over the same route of movement, if they could be published at all, would be so complex as to be unuseable.

ECONOMIC HARDSHIP

The rule of rate making in Section 216(i) of the Act requires that the Commission "give due consideration . . . to the need, in the public interest, of adequate and efficient transportation service . . . and to the need of revenues sufficient to enable (Respondents), under honest, economical and efficient management, to provide such service." We submit that to read the decision and order of March 20, 1963 as requiring the adjustment downward of rates in effect prior to the increases made on January 16, 1961, or to require rates to intermediate points to be held at the levels of presently effective rates at the first points beyond, or to require the elimination of every possibility of a rate to an intermediate point higher than a point beyond over the same route of movement would impose such economic hardship on Respondents as to violate Section 216(i).

There is hardship enough in any attempt to alleviate border disparities. One measure of it is seen in the finding of District Judge Gibson in support of his order of December 17, 1963 restraining the enforcement of the Commission's order of March 20, 1963. He estimated Respondents' losses from compliance with that order to be as high as $791,700 per day. That finding was based on affidavits in the record before the District Court and was not challenged by anyone. A more precise measure of the hardship will be shown in the petition in support of this petition to be filed by the group of Respondents whose principal operations are to and from the western border of Middle Atlantic Territory. As for the precise measure of the hardship to those carriers whose principal operations are to and from the southern border of Middle Atlantic Territory, it will be shown by a supplement to this petition to be filed as soon as an analysis of the Continuing Traffic Study on which it will be based is completed.

CONCLUSION

For all of the foregoing reasons Respondents pray the Commission to issue an order specifically finding that the tariffs filed simultaneously herewith are in compliance with its decision and order of March 20, 1963 in this case.

Respectfully submitted,

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Dated: May 22, 1964

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of May, 1964, served a copy of the foregoing document upon all parties of record by mailing copies thereof by first class mail, properly addressed with postage prepaid.

Bryce Rea, Jr.